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IN THE

Supreme Court of the United States

GENERAL AUTO SERVICE STATION, AN ILLINOIS CORPORATION, F.A.Y. PROPERTIES, INC., AN ILLINOIS CORPORATION, AND COSMOPOLITAN BANK AND TRUST, SUCCESSOR TO THE COSMOPOLITAN NATIONAL BANK OF CHICAGO, NOT INDIVIDUALLY BUT AS TRUSTEE UNDER TRUST AGREEMENT DATED DECEMBER 21, 1994 AND KNOWN AS TRUST # 27340, PETITIONERS

v.

CITY OF CHICAGO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

By ordinance, the City of Chicago grandfathers some, but not all, lawfully established but now non-conforming outdoor signs. The benefit of grandfather status is predicated upon prior compliance with Chicago's former sign permitting requirement that, when it was in force, violated the First Amendment as an invalid prior restraint of speech. The questions presented are:

1. Whether a municipality violates the First Amendment when, by reason of an individual's past exercise of his First Amendment right to ignore an unconstitutional sign permitting requirement, it prohibits the continued display of a lawfully established but now non-conforming outdoor sign.

2. Whether a municipality's prohibition of future speech for some but not all speakers, in the form of non-conforming signs and billboards, otherwise violates the First Amendment, when such prohibition is imposed on the sign owner or operator for having in the past engaged in a certain kind of lawful speech, an issue upon which there is a direct conflict between federal circuit courts of appeals.

3. Whether an outdoor sign ordinance and a separate grandfathering provision modifying that sign ordinance are to be treated as a combined single regulation of speech for purposes of determining content-neutrality and constitutionality under the First Amendment, an issue upon which there is a direct conflict between federal circuit courts of appeals.

RULE 29.6

Petitioner General Auto Service Station is an Illinois corporation that, since the filing of the complaint in the district court, has merged with and into General Auto Service Station, LLC, an Illinois limited liability company. Since the closing of the Estate of Bernard A. Heerey as of January 1, 2006, General Auto Service Station, LLC has been wholly owned by the Bernard Heerey Family Foundation, an Illinois not-for-profit corporation that is a section 501(c)(3) tax-exempt private foundation. Petitioner F.A.Y. Properties, Inc., an Illinois corporation, is wholly owned by General Auto Service Station, LLC.

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PETITION FOR A WRIT OF CERTIORARI

General Auto Service Station, an Illinois corporation, and the other petitioners listed herein, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's interlocutory dismissal order is unpublished. App., *infra*, 76a-101a. The district court's judgment (App., *infra*, 50a-75a) and order denying reconsideration of judgment are unpublished. App., *infra*, 35a-49a. The Seventh Circuit's opinion is published at 526 F.3d 991, App., *infra*, 1a-34a. The Seventh Circuit's denial of rehearing with suggestion for rehearing en banc is unpublished. App., *infra*, 102a.

JURISDICTION

The Seventh Circuit Court of Appeals issued an opinion on May 16, 2008 affirming the dismissal order and judgment of the district court. A petition for rehearing with suggestion for rehearing en banc was denied without opinion by the Seventh Circuit on July 11, 2008. Justice Stevens extended the time for filing a petition for writ of certiorari through November 7, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, MUNICIPAL CODE AND ORDINANCE PROVISIONS INVOLVED

The Constitutional, Municipal Code and Ordinance provisions involved are set forth in the Appendix. App., *infra*, 103a-121a.

STATEMENT

For decades, Chicago's Municipal Code ("Code") imposed a permitting requirement for certain outdoor signs that delegated unlimited discretion to City officials in determining whether to approve proposed outdoor signs and issue sign permits, and otherwise imposed no time limits within which a decision had to be made on any sign permit application. As such, the City's sign approval and permitting requirement constituted an invalid prior restraint of speech, violative of the First Amendment.

Chicago amended its Code in 1998 to require that the City abide by specific objective standards as well as time deadlines in determining whether to approve proposed outdoor signs and issue sign permits, thereby eliminating the unbridled discretion that City officials held until such time.

However, the 1998 Code amendments failed to redress a significant and continuing constitutional infirmity within Chicago's sign permitting scheme: Chicago determines which lawfully established but now nonconforming signs – such as petitioners' advertising sign - will be grandfathered by looking at whether the sign owner or operator successfully secured a sign permit under the prior defective Code. This permit

requirement for grandfathering penalizes (by way of silencing existing speech) the sign operator's past failure to adhere to a law that was facially violative of the First Amendment. Chicago thus conditions the benefit of a grandfathered sign upon prior acceptance of an otherwise impermissible prior restraint. In the case below, the Seventh Circuit determined that conditioning such a benefit upon prior adherence to a sign permitting law does not violate the First Amendment, even if that permitting law was unconstitutional.[1]

A. Basis for Federal Jurisdiction in the District Court

Petitioners filed this action against the City of Chicago in January of 2000. It was originally dismissed without prejudice in an unpublished district court order. The Seventh Circuit Court of Appeals reversed that order in *General Auto et al. v. City of Chicago*, 319 F.3d 902 (7th Cir. 2003), remanding the case for

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[1] The Seventh Circuit upheld the dismissal of petitioners' First Amendment free speech claim. *See General Auto et al. v. City of Chicago*, 526 F.3d 991, 1006-1009 (7th Cir. 2008), App., *infra*, 29a-32a. While petitioners do not in this petition challenge the Seventh Circuit's denial of relief on Fourteenth Amendment due process grounds, issues addressed within the context of the substantive due process claims asserted below have significant bearing on the First Amendment questions presented herein, for the Seventh Circuit has determined that a violation of the First Amendment (or other portion of the Constitution) is an alternative element in a substantive due process claim based on denial of a property right. *See id.* at 1001 ("because the right infringed upon is an interest in property rather than life or liberty, the property owner must first establish either an independent constitutional violation or the inadequacy of state remedies ..." (citing *Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003)), App., *infra*, 16a-17a.

determination on the merits. These opinions are not at issue in this petition. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331. Petitioners' claims arose, in part, under the First Amendment to the Constitution, actionable under 42 U.S.C. § 1983.

B. Petitioners and the Establishment of the Advertising Sign at Issue

Bernard A. Heerey ("Heerey") purchased a building on the near north side of Chicago in 1961, and had an advertising sign painted on the south wall of that building the following year. Some time thereafter, Heerey assigned his beneficial interest in the building to petitioner General Auto Service Station, an Illinois corporation which as of 2001 merged with and into General Auto Service Station LLC (collectively, "GASS"). Through a trust agreement, petitioner Cosmopolitan Bank and Trust holds legal title to the building. The third petitioner, F.A.Y. Properties, Inc. ("F.A.Y."), is an Illinois corporation that acts as an agent and lessor for GASS. *General Auto*, 526 F.3d at 993, App., *infra*, 2a-3a.

The south wall of the subject building was used for advertising continuously from 1962 until the summer of 2008. Over the years, Heerey and later GASS, through F.A.Y., leased the wall space to a variety of entities, including Whiteco Industries, Inc. ("Whiteco"), whose successor, Lamar Advertising Company ("Lamar"), held the most recent lease. Heerey was the sole owner of both GASS and F.A.Y. until his death in 1999. *Id.* at 993-994, App., *infra*, 2a-3a. Following the Seventh Circuit's ruling in its favor, the City issued a take-down order to GASS in late July

of 2008, and the sign was removed from the wall of the subject building pursuant thereto on August 26, 2008.

Because section 86.1-4 of Chicago's Municipal Code (said section sometimes also referred to in the record as being part of the "Electrical Code" or "Building Code," each subsections of the Municipal Code) did not require a permit for non-illuminated signs in 1962 (*see* App., *infra*, 104a), the district court found that Heerey's original sign required no permit. The City accepted this ruling on appeal, as did the Seventh Circuit. The Seventh Circuit also accepted the district court's determination that the sign complied with Chicago's zoning ordinance (also a subsection of Chicago's Municipal Code) when first painted in 1962. *Id.* at 994, App., *infra*, 3a-4a.

In later years, Heerey made two changes to the advertising on his building that, while still compliant with then-existing zoning laws, concededly triggered a permitting "requirement" under the terms of then-governing section 86.1-4 of the Code. *See* App., *infra*, 104a. First, at some point between 1962 and 1969, Heerey illuminated the sign. Second, between 1975 and 1979, Heerey allowed the sign lessee to combine what had been signage on two parts of the face of the wall, and then to expand the size of the sign to 26 feet by 79 feet (the size the sign would remain until its compelled removal in 2008). So far as the evidence at trial showed, no permits were secured for the illumination and subsequent enlargement of the sign. *Id.* at 994-995, App., *infra*, 4a-5a. As discussed in the following two sections, the City's sign permitting requirement during the 1960s and 1970s was facially unconstitutional. Thus, Heerey exercised a

constitutional right when he chose to disregard the permitting requirement.

C. The Seventh Circuit Acknowledges that a Person Faced with an Unconstitutional Permitting Law May Ignore Such Law.

In the case below, the Seventh Circuit stated that it would "accept without deciding that the features of the City's permitting scheme on which GASS has focused indeed rendered the [sign] permit requirement incompatible with the First Amendment, *such that Heerey was entitled to ignore it.*" *Id.* at 1003 (emphasis added), App., *infra*, 22a. Heerey was entitled to ignore the sign permit requirement when he illuminated and later enlarged his sign in the 1960s and 1970s because, as the Seventh Circuit acknowledged, a line of this Court's decisions has made clear that "a person faced with such an unconstitutional licensing law [i.e., a law imposing a facially unconstitutional prior restraint of speech] may ignore it and engage with impunity in the exercise of free expression for which the law purports to require a license." *Id.* (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969)), App., *infra*, 21a.

D. Chicago's Former and Facially Unconstitutional Sign Permitting Laws

Critical to understanding the questions presented in this petition is the proposition, accepted by the Seventh Circuit, that the City's sign permit requirement during the 1960s and 1970s (and through at least 1998) violated the First Amendment as an unconstitutional prior restraint of speech. *See General*

Auto, 526 F.3d at 1003 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-27 (1990)), App., *infra*, 21a. In *FW/PBS, Inc.*, this Court summarized the basis of its authoritative decisions on prior restraints of speech involving government licensing or permitting schemes as follows:

> Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." (Multiple citations omitted.)
>
> ...Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible. (Multiple citations omitted.)

FW/PBS, Inc., 493 U.S. at 225-226.

Signs and billboards are a well-established form of expression and communication subject to First Amendment protection, *see Metromedia v. City of San Diego*, 453 U.S. 490, 501, (1981) (plurality opinion), and are therefore subject to protection from unconstitutional permitting schemes imposed by the government. *See, e.g., Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1272 (11th Cir. 2005) (permitting scheme for signs amounted to unconstitutional prior restraint given lack of time limits on city's obligation to act on permit applications); *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 818-19 (9th Cir. 1996) (sign permit ordinance

constituted unlawful prior restraint in view of city's unbridled discretion to deny sign permits).

Prior to 1998, Chicago's sign permitting laws presented both such forms of impermissible prior restraint. Section 86.1-4 (later known as section 14-40-040) of the Municipal Code, while requiring a sign permit (*see* App., *infra*, 104a-105a), imposed no limits upon the unbridled discretion of local officials to deny a permit application. Section 86.1-5 of the Code provided that "applications [for sign permits] shall be in such form as is prescribed by the Commissioner of Buildings." App., *infra*, 108a. Accordingly, the Commissioner had total discretion as to the information he could choose to seek from an applicant regarding his or her sign, including the sign's message, and City officials were not thereafter required by any Code provision to approve and issue a sign permit, even if the sign would have complied with the Code, including its zoning ordinance. Moreover the Code set forth no specified time period in which City officials had to act on a sign permit application.

The constitutional flaws of Chicago's sign permitting laws went deeper: By 1982, all signboards that exceeded 100 square feet in size would require City council approval "in addition to the normal permit" under section 86.1-11 of the Code.[2] App., *infra*, 111a.

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[2] For a period of four years, between July 12, 1990 and November of 1994, the sign approval required "in addition to the normal permit" for large signs was delegated to the Commissioner of Buildings. In November of 1994, Chicago reinstated, under section 14-40-120 of the Code, the additional requirement of City council approval for all signs over 100 square feet in size. While this section provided that any committee "recommendation" to

Here too, prior to 1998, there were no objective standards set forth in the Code limiting the City council's discretion in determining whether to issue an order to approve a sign permit application; nor were there any time deadlines within which the City council had to act.

The Municipal Code was substantially amended in 1998 to address these constitutional infirmities and to require for the first time: (1) that the Commissioner of Buildings issue a sign permit to an applicant unless the City council issues an order disapproving the application, or the sign is not or will not be in compliance with the Code; (2) that the decision of the City council to approve or disapprove a permit shall be based on specific criteria set forth in the Code, and "shall not be based on the content of the proposed sign;" and (3) a specific time frame within which both the City council and Commissioner of Buildings must take final action on a sign permit application or the applicant shall be deemed to have received full approval and a valid permit from the City. *See* section 14-40-120, as amended on February 5, 1998, App., *infra*, 114a-117a.

E. Chicago Establishes Tighter Restrictions on Advertising Signs

On July 12, 1990, Chicago amended several of the outdoor sign regulations contained in its zoning ordinance. Those amendments included a "tightening" of section 8.9(7), the provision that restricted the size

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disapprove a sign was to be based on various objective criteria, the Code imposed no limits upon the City council's final and unbridled discretion to deny approval. *See* App., *infra*, 112a.

and location of outdoor *advertising* signs located in a business district, and added a provision that "[n]o advertising sign having a face which exceeds 100 square feet shall be permitted within 250 feet of a residence district."[3] App., *infra*, 118a. As petitioners' sign was more than 100 square feet in size and was within 250 feet of a residence district, it became "non-conforming" with the advent of this 1990 zoning amendment. *See General Auto*, 526 F. 3d at 994, App., *infra*, 5a.

F. Chicago Establishes a Grandfather Provision for Non-conforming Signs Predicated on Prior Compliance with the City's Former and Facially Unconstitutional Permitting Laws.

The July 12, 1990 zoning amendments also included the establishment of section 6.7-1(a), a grandfather provision for nonconforming outdoor signs that was tied directly to the City's sign permitting "requirement." Section 6.7-1(a) of the zoning ordinance provided that:

> Any sign that does not conform to Sections 8.9(5), 8.9(6), 8.9(7), 9.9(5), 9.9(6), 9.9(7), 10.14(5), 10.14(6), or 10.14(7) of this chapter, as amended by this ordinance, *and that was lawfully erected pursuant to a permit lawfully issued* prior to the

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[3] Section 8.9(7) has remained substantially unchanged since 1990 and is now known as section 17-12-1006A. *See* App., *infra*, 118a-119a. While an "advertising sign" (defined in former section 3.2 of the zoning ordinance) is now referred to as an "off-premise sign" (defined in current zoning ordinance as section 17-17-02108), the definition of such signs has remained virtually unchanged since 1961. *Compare* said definitions, App., *infra*, 120a.

> effective date of this section, may remain in use as a legal non-conforming sign.

App., *infra*, 120a. Emphasis added. The "permit lawfully issued" requirement set forth in section 6.7-1(a) of the zoning ordinance refers to prior compliance with former section 86.1-4 of the Municipal Code, the unconstitutional provision addressing sign permitting.

G. Chicago's Regulation of Petitioners' Advertising Sign

As a result of the 1990 zoning amendments, the City issued a violation notice to Heerey in September of 1994 charging that since the sign was in fact an advertising sign that was larger than 100 square feet and within 250 feet of a residence district, it now violated section 8.9(7) of the zoning ordinance. In response, Heerey's lessee, Whiteco, determined that it would submit a sign permit application to the City to demonstrate the sign's legality. In reviewing a subsequent permit application filed in early 1995, the City zoning department found the advertising sign to be a "legal non-conforming" use, and so marked the application to indicate that the sign "conforms to zoning ordinance." *General Auto*, 526 F.3d at 995-996, App., *infra*, 5a-6a. (The City would later contend that this finding was in error because a prior sign permit is requisite to legal non-conforming "grandfather" status under section 6.7-1(a) of the zoning ordinance.)

As signs that exceed 100 square feet in size required City council approval under section 14-40-120 in the form of an order in addition to the normal permit (*see* App., *infra*, 112a), Whiteco, in furtherance of its

1995 sign approval application, wrote the City alderman whose ward included the property where the sign stood, requesting his assistance in processing and approving the sign permit. (Chicago's City council consists of the City's 50 aldermen from the City's 50 wards.) There was no evidence of a response and the City took no further action on Whiteco's permit application. The Seventh Circuit commented that "for reasons that the record does not reveal, Whiteco never obtained an order from the City council approving the sign"[4] but also took no further action on the 1994 violation notice. *Id.* at 996, App., *infra*, 6a.

The City made no further objection to the sign until August 22, 1997, when it issued another violation notice, one that did not assert any zoning violation *per se* but instead instructed the sign operator to obtain a permit for the sign. At an administrative hearing the following month, a City hearing officer found the sign to be in violation of the Code because it lacked a permit, but the hearing officer also ruled that "respondent [Whiteco] afforded opportunity of mitigation via compliance," and continued the matter for a hearing on fines. *Id.*, App., *infra*, 6a-7a.

Based on facts stipulated at trial that reflected the facts alleged in petitioners' first amended complaint, the Seventh Circuit summarized Whiteco's subsequent "mitigation" efforts as follows:

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[4] The record does reveal that at this time in 1995, Chicago's Municipal Code did not require its local officials or its City council to act on a request for processing and approval of a sign permit application within any specified time period. *See* sections 14-40-040 and 14-40-120, App., *infra*, 105a and 112a.

> Whiteco... attempted to bring the sign into compliance with the building code by [again] applying for a permit, but its efforts met with failure. On April 21, 1998, the City's Zoning Administrator denied zoning certification for the sign on the grounds that the sign violated the provision of the zoning ordinance [section 8.9(7)] regarding the proximity of [advertising][5] signs to residential districts and was not grandfathered because there was no prior permit for the sign on file [a prior permit being a prerequisite for "grandfathering" under section 6.7-1(a) of the ordinance]. Given the lack of zoning certification, the City did not issue a permit for the sign....
>
> [In October of 1998], a City hearing officer entered a final order on the 1997 notice of violation imposing a fine of $250 and ordering Whiteco to remove the sign within 90 days in the event it did not obtain a permit.

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[5] The Seventh Circuit's omission of the word "advertising" is misleading, for Chicago had no (and has no) provision regulating the proximity of signs *in general* to residence districts (a/k/a "residential districts"); the zoning provision referred to here by the Seventh Circuit as the basis of the denial of zoning certification (and therefore denial of a permit) for the sign, section 8.9(7), regulated the proximity of only *advertising* signs to residence districts. This point is significant, for the Seventh Circuit ultimately found that petitioners failed to state a claim under the First Amendment because it deemed the "regulation at issue" to be content-neutral, and a valid time, place and manner restriction, not a regulation based on the commercial content of speech. *See id.* at 1007-1008 (App., *infra*, 30a-32a) and discussion, *infra*, at 17-21.

Id.; *see also* administrative order of 4-21-98 denying zoning certification; Rec. 61 (exhibit to First Amended Complaint).

H. Disposition of Petitioners' As Applied and Facial Challenges under the First Amendment

1. The District Court Disposition

Petitioners asserted in count I of their first amended complaint that the advertising sign at issue constituted commercial speech that was not misleading and which the City had no legitimate or substantial interest in restricting or prohibiting; and that the City's threatened and impending prohibition of the sign therefore violated the First Amendment. *General Auto*, 526 F.3d at 997, App., *infra*, 9a; *see also* First Amended Complaint, 2003 WL 24059233.

In dismissing the First Amendment claim, the district court acknowledged that petitioners' First Amendment challenge turned on a scheme of related sign regulations: sections 8.9(7) and 6.7-1(a) of the zoning ordinance and section 86.1-4 of the Municipal Code (later called section 14-40-040 of the Code).[6]

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[6] Recall that 8.9(7) of the zoning ordinance restricted the size and location of outdoor advertising signs. Section 6.7-1(a) of the zoning ordinance, the grandfather provision for non-conforming signs adopted by the City on July 12, 1990, allowed some advertising signs that did not comply with section 8.9(7) (among other sections) to remain in place (i.e., to be "grandfathered"), if such signs had been lawfully erected pursuant to a lawfully issued permit, thereby invoking mandatory prior compliance with section 86.1-4 of the

Noting, among other things, that section 14-40-040 of the Code (formerly known as section 86.1-4 of the Code) had general application to certain other signs regulated by the City irrespective of the sign's message, the district court concluded that petitioners' as applied First Amendment claim could not properly be analyzed as a restriction of commercial speech. *See* Dismissal Order, App., *infra*, 83a-84a. The district court further commented that it believed petitioners' First Amendment arguments were "nothing more than a restatement of its arguments that the City's refusal to 'grandfather'... deprives [petitioners] of due process ... [and that petitioners] cannot convert what is essentially a due process claim into one under the First Amendment because theirs is an advertising sign." *Id.*, App., *infra*, 84a-85a.

Petitioners also challenged the City's threatened prohibition of their advertising sign under the theory

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Code (the City's former sign permit provision).

On November 1, 2004, a little over a month before trial in the case below, section 6.7-1(a) was revised and became known as sections 17-15-0502 and 0503. *See* App., *infra*, 120a-121a. Although the City eliminated the "permit lawfully issued" requirement from its grandfather provision for signs on November 1, 2004, it reinstated that requirement just two days later on November 3, 2004, by amending section 17-15-05-02 to require a sign to have been "established pursuant to a lawfully issued permit" to qualify for grandfather status, a provision substantially similar to former section 6.7-1(a). *Compare* said versions of section 17-15-05-02, App., *infra*, 121a. The City's reinstatement of this grandfathering "requirement" was overlooked by the Seventh Circuit in its passing reference regarding the nature of Chicago's current grandfather provision for signs. *See General Auto*, 526 F.3d at 995, fn 3, App., *infra*, 33a. No change in the law, therefore, has mooted any of the "questions presented" herein.

that the permitting requirement constituted an impermissible prior restraint, facially violative of the First Amendment. The district court rejected this facial challenge as well, noting in its denial of reconsideration and amendment of judgment that it had "not [been] persuaded that Chapter 86.1 implicates First Amendment concerns...." Order Denying Amendment of Judgment, App., *infra*, 42a.

2. The Circuit Court Disposition

Although the Seventh Circuit acknowledged that the City's sign permitting laws did in fact implicate First Amendment concerns, it found this to be relevant only within the context of whether a due process property right had been established:

> [G]iven the asserted defects in the permitting scheme as it existed when Heerey illuminated and expanded the sign, GASS contends that the permit requirement should be treated as a nullity with which Heerey was not obligated to comply. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 939, 22 L.Ed.2d 162 (1969) ("a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of free expression for which the law purports to require a license").
>
> We may accept without deciding that the features of the City's permitting scheme on which GASS has focused indeed rendered the permit requirement incompatible with the First Amendment, such that Heerey was entitled to

> ignore it. Indeed, Heerey *did* ignore it.... But the question for us is whether, by virtue of the defects in the permitting scheme as it existed in that time period, Heerey and GASS also obtained a protected property interest in the sign as a lawful, non-conforming use, just as if Heerey had obtained a permit or as if the electrical code had not required a permit for the illumination or expansion of an existing sign.

General Auto, 526 F.3d at 1003 (emphasis in original), App., *infra*, 21a-22a. The Seventh Circuit went on to find that GASS had no property interest in the current sign, and thus rejected petitioners' substantive due process property right claims. *Id.* at 1003-1006.

But by limiting the "question" of the former permitting scheme's constitutional defects to whether petitioners could establish a due process property interest in the sign, the Seventh Circuit rejected that petitioners had stated a First Amendment claim by reason of the City's perpetuation of those defects through its grandfather provision for signs. Indeed, in addressing the First Amendment claim, the Seventh Circuit wholly ignored the fact that prior compliance with the City's former and facially unconstitutional sign permit requirement is an express condition to the continued right to display a lawfully established but now non-conforming advertising sign under section 6.7-1(a). *See Id.* at 1006-1009, App., *infra*, 29a-32a.

In addressing their First Amendment claim to the Seventh Circuit, petitioners argued in significant part as follows:

The district court erroneously concluded ... that the Plaintiffs' First Amendment challenge was not aimed at the ordinance's regulation of commercial speech.

The district court's analysis ... misses the point. How close to a "residential district" an advertising sign may permissibly exist, and whether there will be exceptions to such restrictions for certain advertising signs erected prior to a time when such restrictions were "on the book," is regulated by section 8.9(7) *in conjunction with* section 6.7-1(a) of the Zoning Ordinance. (Emphasis in original.)

The regulation at issue, therefore, is a regulation of commercial speech. Because of this, Plaintiffs' First Amendment claim must be scrutinized under the standard set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

....

...[The] City has no legitimate interest under the First Amendment in making an irrational and arbitrary distinction among nonconforming advertising signs, as outlined in arguments asserted *supra*. [Arguments addressing City's former permitting requirement as an impermissible prior restraint, invoked through the City's grandfather provision, are set forth at GASS Amended Br. 19, 35-41; 2006 WL 3319640.]

> ...In the instant case, there ... exists no "reasonable fit" between the City of Chicago's restriction against some, but not all, legally erected advertising signs based on its application of 8.9(7) of the Zoning Ordinance in conjunction with 6.7-1(a) of the Zoning Ordinance.

GASS Amended Br. 45-47, 2006 WL 3319640.

The Seventh Circuit, however, determined that it would not analyze the combined effect or scheme of section 8.9(7) and Section 6.7-1(a) of the ordinance (the latter provision invoking mandatory prior compliance with the sign permit requirement of section 86.1-4 of the Code). Failing to acknowledge the First Amendment argument asserted by petitioners, the Seventh Circuit stated as follows:

> True enough, section 8.9(7) of the zoning ordinance is a regulation of commercial speech.... But GASS does not contend that the constitutionality of section 8.9(7) itself is suspect. It does not even analyze section 8.9(7) pursuant to the *Central Hudson* test. Its attack, as ... GASS's appellate brief makes plain, is on the grandfather provision of section 6.7-1(a), and the differing treatment that provision grants to previously permitted signs as distinct from signs that were enacted without a permit.

General Auto, 526 F.3d at 1007, App., *infra*, 31a.

Petitioners alternatively argued in their opening brief to the Seventh Circuit that "even if [it] were to find the City's sign permitting scheme to be a content-

neutral time, place and manner restriction, it still would not pass constitutional muster...." GASS Amended Br. 40-41; 2006 WL 3319640. In making this argument, Petitioners quoted from *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), wherein this Court stated:

> [E]ven content-neutral time, place and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

GASS Amended Br. 40 (quoting *Thomas*, 534 U.S. at 323), 2006 WL 3319640. Given the unduly broad discretion held by Chicago's licensing officials, petitioners argued that "the City's sign permitting scheme constituted, and still constitutes ... an invalid time, place and manner restriction of speech, violative of the First Amendment." *Id.* at 41, 2006 WL 3319640.

Again, however, the Seventh Circuit believed the City's scheme of permitting regulations (i.e., section 6.7-1(a) of the zoning ordinance, invoking by its terms mandatory compliance with section 86.1 of the Code, the former sign permitting provision) should not be reviewed in conjunction with each other, determining instead to analyze section 6.7-1(a) (the grandfather provision) in isolation, and without reference to section 86.1-4 of the Code:

> The City has gone on to analyze the grandfather provision as a time, place and manner restriction, but GASS itself has made no argument that the [grandfather] provision [as opposed to the scheme of permitting provisions addressed by petitioners] is unconstitutional under that framework, thereby waiving any such contention. For these reasons, we believe the district court correctly dismissed GASS's First Amendment claim.

General Auto, 526 F.3d at 1007-1008, App., *infra*, 32a.

REASONS FOR GRANTING THE PETITION

The decision below presents an untenable and paradoxical view of the Constitution. After declaring that it "may accept without deciding" that Chicago's former sign permitting scheme "indeed rendered the permit requirement incompatible with the First Amendment, such that Heerey was entitled to ignore it" (*see id.* at 1003 (citing *Shuttlesworth*, 394 U.S. at 151), App., *infra*, 22a), the Seventh Circuit has nevertheless let stand a severe penalty upon the exercise of that First Amendment right: it has stoutly upheld Chicago's decision to condition future speech rights (via non-conforming signs) upon prior acceptance of, and adherence to, that same unconstitutional permit requirement. *See id.* at 1007-1008, App., *infra*, 31a-32a.

I. The Seventh Circuit's Decision Conflicts with an Important Billboard Decision from the Ninth Circuit, and Otherwise Conflicts with Relevant Decisions of this Court Holding that the Government May Not Grant a Benefit on Condition of the Beneficiary Surrendering, or Forbearing the Exercise of, a Constitutional Right.

The Seventh Circuit's decision conflicts with the Ninth Circuit's 2007 decision in *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895 (9th Cir. 2007). In *Outdoor Media*, the Ninth Circuit reviewed a California district court's dismissal of a sign company's First Amendment claim against the City of Beaumont based on the denial of a conditional use permit. While the Ninth Circuit found the district court to have "correctly determined that Outdoor Media lacked a vested property right in its unapproved billboard application, and therefore its procedural due process claim was properly dismissed," it further found the district court to have erred in dismissing Outdoor Media's First Amendment claim solely because it lacked a vested property right:

> The establishment of a vested property right is irrelevant to such a challenge. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 72, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (rejecting argument that employee's First Amendment rights were not infringed by politically motivated promotion decisions because employee had no legal entitlement to promotion).

Outdoor Media, 506 F.3d at 903.

By determining that Chicago's unconstitutional sign permitting requirement bears relevance only in whether a due process property right may be established, and not in whether the right to continue a sign's display may be conditioned upon prior compliance with that same unconstitutional requirement without violating the First Amendment, the Seventh Circuit's decision conflicts with what the Ninth Circuit in *Outdoor Media* observed in finding a First Amendment claim to have been improperly dismissed:

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible.

Id. (quoting *Rutan*, 497 U.S. at 72 (internal quotation marks and citations omitted)); *see also Perry v. Sindermann*, 408 U.S. 593 (1972) (lack of contractual right to re-employment did not defeat teacher's claim that nonrenewal of employment contract by the State, based on teacher having been publicly critical of State's

policies, violated his free speech rights under the First Amendment).

The City of Chicago conditions the right to display a lawfully established but now nonconforming outdoor advertising sign on prior compliance with the City's former sign permitting requirement, a requirement that itself was facially violative of the First Amendment as a prior restraint of speech. The Seventh Circuit does not find that this arbitrary conditioning of future speech rights violates the First Amendment. Yet in making this determination, the Seventh Circuit has carved out an exception to this Court's pronouncement that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *Rutan*, 497 U.S. at 72 (quoting *Perry*, 408 U.S. at 597).

Left as it stands, the Seventh Circuit's nominal acknowledgment of a citizen's right to disregard an unconstitutional permitting law and concomitant conclusion that compliance with such an unconstitutional law is, in any event, "requisite" for securing future speech rights if the government so dictates, sharply diminishes fundamental freedoms preserved by the Constitution as interpreted by this Court. Certiorari should be granted to address the obvious conflict.

II. The Seventh Circuit's Decision Conflicts with an Important Decision from the First Circuit that Found Past Lawful Speech to be an Unconstitutional Basis on Which to Deny the Right of Future Speech through Non-conforming Billboards.

In *Ackerley Communications of Massachusetts v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989), the First Circuit determined that a municipality had violated the First Amendment by using past lawful speech as a basis on which to decide whether advertisers would be permitted to continue to post billboard advertisements that do not conform to current law. *Id.* at 521-522.

In making this determination, the First Circuit faced the same issue as the Seventh Circuit in the case below, and stated as follows:

> [T]he issue is whether a severe penalty—a prohibition against future speech—may be imposed on a speaker because he in the past engaged in a certain kind of lawful but less favored speech. We conclude that the First Amendment does not permit this particular discrimination.
>
> What Somerville's ordinance does on its face is to bar some, but not all, speakers from displaying messages in a particular manner, i.e., with nonconforming billboards .... Thus, Somerville has not limited completely a manner of speaking—nonconforming signs—but instead permits only certain speakers to speak in such a

> manner. Even if a complete ban on nonconforming signs would be permissible, we must consider carefully the government's decision to pick and choose among the speakers permitted to use such signs. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85, 98 S.Ct. 1407, 1420-21, 55 L.Ed.2d 707 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating ... the speakers who may address a public issue.")).

City of Somerville, 878 F.2d at 518.

The First Circuit's decision in *City of Somerville* cannot be squared with the Seventh Circuit's decision in the case below, for the Seventh Circuit found no violation of the First Amendment in spite of the same "severe penalty—a prohibition against future speech" because a sign owner "in the past engaged in a certain kind of lawful but less favored speech." *Id.* In the case below, the less favored speech was the display of an advertising sign that had not first been vetted and approved under Chicago's former and facially unconstitutional sign permitting laws; and the less favored speaker was defined by, and continues to be defined by, his past exercise of a constitutional right. The conflict between the federal circuit courts of appeals is palpable, and should be resolved by this Court.

III. The Seventh Circuit's Refusal to Analyze the Constitutionality of a Sign Regulation, as Such Sign Regulation is Modified by a Separate Grandfather Provision, Conflicts with Another Important Decision from the First Circuit that Found the "Interplay" between a Sign Regulation and Separate Grandfather Statute to be Content-Based and Unconstitutional under the First Amendment.

The Seventh Circuit determined in the case below that it would not analyze the combined effect or scheme of section 8.9(7) and section 6.7-1(a) of the zoning ordinance (the latter provision invoking mandatory prior compliance with the sign permit requirement of former section 86.1 of the Code). *See General Auto*, 526 F.3d at 1007, App., *infra*, 31a. Although the City of Chicago considered the aforementioned provisions in combination when it determined that petitioners' advertising sign was prohibited, the Seventh Circuit apparently deemed such fact immaterial to whether petitioners had stated a valid First Amendment claim.

In direct conflict with the Seventh Circuit's decision, the First Circuit Court of Appeals in *Ackerley Communications of Massachusetts v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996), a case that followed *City of Sommerville* by seven years, did in fact examine the constitutionality of what it acknowledged to be "the combined effect of the local ordinance [regulating outdoor signs] and state law [imposing grandfather protection thereto]." *Id.* at 34. In so doing, the First Circuit determined that it would:

> treat the state grandfathering provision as part-and-parcel of the Cambridge ordinance, and ... assume that the grandfathering provision is contained within it ....
>
> ....
>
> ...The issue we must decide is whether Cambridge may enforce its sign ordinance to require Ackerley to remove its billboards .... [T]he impact of the state grandfathering provision is relevant to that inquiry regardless of the statute's [independent] constitutionality.

Id. at 36. The First Circuit found the regulation resulting from the "combined effect" of the sign ordinance and state law grandfathering provision to be content-based and unconstitutional under the First Amendment. *Id.* at 39. The First Circuit further explained its decision as follows:

> We do not in this decision rule unlawful any particular section of the ordinance. Rather, because the constitutional problem stems from the interplay of the ordinance and the state provision, we hold only that Cambridge may not require removal of signs displaying noncommercial messages based on their exclusion from exemption under the state [grandfather] provision.

Id. at 40.

In the case below, the Seventh Circuit chose not to accept that section 6.7-1(a), Chicago's grandfathering

provision for outdoor signs, is part-and-parcel of section 8.9(7), the sign regulation applied by the City of Chicago to prohibit petitioners' sign because of its advertising message. Choosing to view the grandfather provision in isolation (and ignore the argument made by petitioners that the grandfather provision had been applied "in conjunction" with Chicago's sign ordinance regulating advertising signs), the Seventh Circuit determined the "regulation at issue" to be content-neutral and constitutional. Yet free speech rights conferred under the First Amendment should not rise or fall subject to the conflicting approaches adopted by the respective federal circuit courts of appeals under nearly identical facts. This Court should grant certiorari and resolve the conflict between the federal circuits.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Nos. 05-2515 & 06-2672
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GENERAL AUTO SERVICE STATION, et al.,
Plaintiffs-Appellants,
v.
CITY OF CHICAGO,
Defendant-Appellee.

June 4, 2007, Argued

May 16, 2008, Decided

JUDGES: Before RIPPLE, ROVNER, and SYKES, Circuit Judges.

OPINION

ROVNER, *Circuit Judge.* The plaintiffs-appellants are the owners and the agent of a building in Chicago that for more than four decades has displayed an advertising sign without a permit. Current zoning provisions prohibit the sign given its size and proximity to a residential district, but the plaintiffs contend that because the sign was lawful when first erected, they have a right to continue displaying the sign. After the City of Chicago declared the sign unlawful and ordered it removed, the plaintiffs-appellants filed suit under 42 U.S.C. § 1983 challenging the City's action on a variety of constitutional grounds. The district court resolved the suit in the City's favor. We affirm.

I.

Bernard A. Heerey purchased the building located at 1127-33 North State Street in Chicago in 1961. Pursuant to a 1984 trust agreement, Cosmopolitan Bank and Trust now holds legal title to the property. Heerey assigned his beneficial interest in the property to General Auto Service Station,[1] an Illinois corporation which in 1998 merged with and into General Auto Service Station LLC (collectively, "GASS"). F.A.Y. Properties, Inc. ("F.A.Y.") is an Illinois corporation that acts as an agent and lessor for GASS. Heerey was the sole owner of both GASS and F.A.Y. Heerey died in 1999 at the age of 79 without immediate family to survive him. The terms of his will provide that once certain bequests are made, the assets in his estate, which include a number of properties on Chicago's north side, are to be placed in a charitable trust in order to fund distributions to religious and charitable organizations. As of the date this case was tried in December 2004, the probate of Heerey's estate was ongoing and the trust had not yet been funded.

The south exterior wall of the building at 1127-33 North State Street is a desirable location for advertising. The building is four stories tall, and soon after Heerey purchased the property, the buildings to its immediate south were torn down, eventually to be replaced by a one-story building. As a result, the exposed south wall of the building at 1127-33 North State is visible to motorists and pedestrians passing through the nearby intersection of North Rush and State Streets, in the heart of Chicago's Gold Coast.

In 1962, Heerey, without first seeking or obtaining a permit from the City, had an advertising sign painted on the south wall of the building. That wall has been continuously used for advertising since that time. In the ensuing years, Heerey and later GASS, through F.A.Y., leased the advertising space on the building to a variety of entities, including Whiteco Industries, Inc., whose successor, Lamar Advertising Company, holds the current lease. We shall refer to these lessees collectively as "Whiteco." For the one-year period ending July 14, 2008, GASS is being paid $ 99,074.48 for the lease of the sign.

When Heerey first began using the side of his building for advertising in 1962, section 86.1-4 of the City's electrical code provided in relevant part that "[i]t shall be unlawful to proceed with the erection, enlargement, alteration or rehang of any illuminated sign or illumination of signboard unless a permit therefore shall have first been obtained from the Commissioner of Buildings." The district court understood this language to require a permit only for an illuminated sign. Because the original sign on Heerey's building was not illuminated, the court concluded that no permit was required. R. 126 at 16. The City accepts that ruling for purposes of this appeal, as do we.

At all times relevant to this suit, the property at 1127-33 North State Street has been located within a district zoned by the City for business use. However, the sign on the south wall of the building has always been within 75 feet of a district zoned for residential use.

As of 1962, section 8.9(5) of the City's zoning ordinance prohibited advertising signs "within 75 feet of any

property in a Residence District." The district court took the phrase "any property" in this provision to mean any improved property. Although the sign on Heerey's building is within 75 feet of a residential district, when first erected it was not within 75 feet of any improved property in such a district. Consequently, the court assumed that the sign was lawful when first painted on Heerey's building. R. 126 at 15. Although the City contested this point below, it has not quarreled with the district court's assumption for purposes of this appeal. Consequently, we like the district court shall assume that the sign was lawful when first erected.

In subsequent years, however, Heerey made two changes vis-a-vis the advertising on his building for which a permit was indubitably required under the then-governing terms of the City's electrical code. First, at some point between 1962 and 1969, Heerey illuminated the sign by installing lights near the roof line of his building. Section 86.1-4 of the code, which we quoted from above, required that a permit be issued by the Commissioner of Buildings for, among other things, the "erection" of an illuminated sign and the "illumination of signboard." Second, between 1975 and 1979, Heerey allowed the lessee of the advertising space on his building to combine what had been two signs into a larger, single sign by covering the building windows that had separated the two signs. Then, in 1979, that sign was enlarged to its current dimensions of 26 feet by 59 feet. These changes again triggered the permit requirement of section 86.1-4, which applied to any "enlargement" or "alteration" made to "any illuminated sign." The district court thus concluded that Heerey was required to obtain a permit before illuminating and enlarging the signage on his building.

R. 126 at 16-17. So far as the record reveals, Heerey did not obtain a permit before he made any of these modifications.[2]

In 1986, the City finally took notice that the sign lacked a permit. On September 3 of that year, it issued a violation notice to Heerey's property management company asserting that the illuminated sign had been installed without a perm it in violation of section 86.1 of the electrical code. App. 193. A hearing before the City's electrical compliance board was scheduled and continued on several occasions, but the City took no further action on the 1986 notice.

In 1990, the provision of the City's zoning ordinance regarding the distance between advertising signs and residential districts was toughened. Whereas before, section 8.9(5) of the ordinance (as construed by the district court) permitted no advertising sign within 75 feet of improved property in a residential district, section 8.9(7) of the revised ordinance now provided that "[n]o advertising sign having a face which exceeds 100 square feet shall be permitted within 250 feet of a Residence District" and that "no advertising sign" of any size "shall be permitted within 75 feet of a Residence District." App. 237. A "grandfather" provision, section 6.7-1(a), was added to the ordinance providing that any sign not conforming to the new distance requirements (among others) which had been "lawfully erected pursuant to a permit lawfully issued prior to the effective date of this section, may remain in use as a legal non-conforming sign.' App. 227.[3]

On September 29, 1994, the City issued a second violation notice to Heerey, this one charging that

because the face of the sign was larger than 100 square feet and was within 250 feet of a residential district, the sign violated the distance requirement adopted in 1990. App. 113. Heerey's attorney forwarded the notice to Whiteco and asked that it handle the matter. Whiteco in turn submitted a permit application to the City. App. 113A. That application was approved initially by the City's zoning department on January 12, 1995. Zoning employee William Merritt determined that the sign was a "legal non-conforming" use, and he therefore stamped the permit application to indicate that the sign "conforms to zoning ordinance." App. 107 P36, App. 113B. At that point, the approval of the City's building department was required, and Whiteco submitted its permit application to that department for review. However, for any sign that exceeded 100 square feet in size, the municipal code required City Council approval in addition to a permit. App. 285. On April 19, 1995, the building department noted on a "plan correction sheet" issued to Whiteco that a copy of the Council's order approving the sign "must be attached to the permit application." App. 208. Whiteco had written to the City alderman whose ward included the State Street property one week earlier requesting his support and assistance in obtaining such approval. But for reasons that the record does not reveal, Whiteco never obtained an order from the City Council approving the sign. For its part, the City took no further action on Whiteco's 1994 permit application.

On August 22, 1997, the City issued a third notice of violation to Heerey's property management company directing Heerey to "[o]btain permit for outdoor flat building sign installed without permit." App. 108 P40; App. 116. Heerey's attorney again forwarded the notice

to Whiteco asking that it handle the matter. Whiteco appeared as the respondent before the City's Department of Administrative Hearings on September 30, 1997, and admitted that it was not in compliance with the permit requirement. The hearing officer entered the following findings and order:

> Respondent is found to be in violation of the Chicago Building Code with regards to the afore stated charges; however, Respondent afforded opportunity of mitigation via compliance. Compliance must be evidenced by reinspection and/or other evidence corroborating conditions. This matter is continued for hearing on fines . . .

App. 117 (footnote omitted).

Whiteco subsequently attempted to bring the sign into compliance with the building code by applying for a permit, but its efforts met with failure. On April 21, 1998, the City's Zoning Administrator denied zoning certification for the sign on the grounds that the sign violated the provision of the zoning ordinance regarding the proximity of signs to residential districts and was not grandfathered because there was no prior permit for the sign on file. Given the lack of zoning certification, the City did not issue a permit for the sign. Whiteco appealed the denial of zoning certification to the City's Zoning Board of Appeals ("ZBA"), but the ZBA sustained the denial on September 14, 1998.

The following month, a City hearing officer entered a final order on the 1997 notice of violation imposing a fine of $ 250 and ordering Whiteco to remove the sign within 90 days in the event it did not obtain a permit.

App. 161. By the terms of the City's zoning ordinance, GASS as the (effective) owner of the property is liable for the violation to the same extent as its lessee, Whiteco. The City's order has yet to be enforced; to this day, Whiteco's successor continues to lease the sign and display advertising on the south wall of GASS's building.

Whiteco filed suit in the Circuit Court of Cook County seeking judicial review of the ZBA's decision, arguing in part that the ZBA had overlooked the fact that no permit had been required when the sign was first erected in 1962 and that, consequently, the sign qualified as a legal, non-conforming use under the grandfather provision of the zoning ordinance. The Circuit Court denied review on March 2, 2000. The court found that Whiteco had failed to present any evidence to the ZBA in support of the notion that the sign constituted a legal, non-conforming use. Whiteco appealed, but the Illinois Appellate Court affirmed in September 2001 and the Illinois Supreme Court subsequently denied Whiteco's petition for leave to appeal.

In the meantime, GASS, as the owner of the property, was seeking relief of its own. Late in 1999, GASS filed a declaratory judgment action in state court challenging the relevant provisions of the zoning ordinance and the City's failure to grant it a permit in 1994 on a variety of grounds. At the same time, GASS sought leave to intervene in Whiteco's action so that it too could challenge the ZBA's refusal to order zoning certification for the sign. The state court denied GASS's request to intervene in Whiteco's suit,[4] and GASS

eventually dismissed its own state-court suit in favor of the instant federal suit.

GASS (along with F.A.Y. and Cosmopolitan Bank, but for the sake of simplicity, we shall refer only to GASS) filed this section 1983 action against the City in January 2000. GASS's second amended complaint[5] asserted a variety of constitutional claims, four of which are pursued in this appeal. First, GASS asserted that the advertising sign constituted commercial speech that was not misleading and which the City had no legitimate or substantial interest in restricting or prohibiting. The City's invocation of its zoning ordinance to prohibit the sign therefore deprived GASS of its rights under the First Amendment to the U.S. Constitution. R.122, Count I. Second, GASS contended that the City, in failing to process its 1994 application for a permit, violated its right to procedural due process under the U.S. Constitution. *Id.*, Count II. Third, GASS asserted that in refusing to recognizing its sign as a lawful, non-conforming use under the grandfather provision found in section 6.7-1 of the zoning ordinance, the City had applied its laws in a way that did not promote the public health, safety, morals, or general welfare and therefore had deprived GASS of substantive due process under the U.S. Constitution. *Id.*, Count III. Fourth, GASS claimed that the City's application of the 1990 zoning provisions, and its refusal to grandfather the sign, amounted to a retroactive application of laws enacted after the sign's erection that deprived GASS of its vested property and contractual rights in a harsh, oppressive, and arbitrary manner, thereby again depriving GASS of its right to substantive due process. *Id.*, Count IV.[6] GASS sought a declaratory judgment on each of its claims and an

injunction barring the City from enforcing the zoning ordinance as to its sign and/or requiring the City to issue a permit for the sign.

Initially, the district court dismissed the suit without prejudice, abstaining pursuant to *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), in deference to Whiteco's then-ongoing suit for administrative review in state court. R. 37, *Gen. Auto Serv. Station v. City of Chicago*, 2001 U.S. Dist. LEXIS 23711, 2001 WL 558148 (N.D. Ill. May 21, 2001); R. 44, 2002 WL 221582. We reversed that dismissal in *Gen. Auto Serv. Station LLC v. City of Chicago*, 319 F.3d 902, 905 (7th Cir. 2003). We reasoned in relevant part that because GASS's request to intervene in Whiteco's state court action had been denied, GASS had not had the opportunity to defend its interests as the owner of the property in that action. *Id.* at 905.

On remand, the district dismissed GASS's First Amendment and procedural due process claims. The court concluded that the real focus of the First Amendment claim was on the distinction that the grandfather provision drew between signs erected pursuant to a permit and signs, like GASS's, which were erected at a time when no permits were required. As such, the court reasoned, this claim was nothing more than a restatement of GASS's separate substantive due process claim.

> Plaintiffs claim that the zoning ordinance violates the First Amendment because it allows advertising signs that pre-dated the 1990 amendments and which now violate those amendments to remain only if the signs were

> initially erected pursuant to a permit, regardless of whether such a permit was even required at the time the sign was erected. Plaintiffs' sign happens to be an advertising sign, but the provisions they really challenge here--the legal, non-conforming use and permit provisions, by which the City only "grandfathers in" those signs that were issued pursuant to a permit--apply to all signs, not just advertising signs. Plaintiffs nowhere argue that the size and distance restrictions on advertising signs found in Section 8.9(7) will not pass constitutional muster. Thus, the court agrees with the City that the Plaintiffs' challenge is not aimed at the ordinance's regulation of commercial speech.
>
> Moreover, as the court noted in its earlier decision [dismissing the suit on abstention grounds], "Plaintiffs' First Amendment argument is nothing more than a restatement of its arguments that the City's refusal to 'grandfather' Plaintiffs' sign deprives it of due process." *General Auto Service Station*, 2001 U.S. Dist. LEXIS 23711, 2001 WL 558148, at *6. Plaintiffs cannot convert what is essentially a due process claim into one under the First Amendment merely by noting that theirs is an advertising sign. Plaintiffs have not effectively alleged a First Amendment Challenge to the zoning ordinance . . . .

R. 93, 2004 U.S. Dist. LEXIS 3800, 2004 WL 442636, at *4-*5. The court found the procedural due process claim to be untimely. That claim was based on the City's purported failure to process Whiteco's 1994 permit

application. But GASS knew by August 1997, when the City issued yet another notice of violation, that the City had not processed the 1994 application. Consequently, in the court's view, the two-year statute of limitations on this claim began to run no later than August 1997 and had expired well before GASS filed this suit in January 2000. *Id.* at *8 The court rejected the City's contention that the substantive due process claims were also untimely. *Id.* at *9.

The district court conducted a one-day bench trial on the substantive due process claims, and ultimately found in favor of the City on those two claims. The court ruled in the first instance that the claims were time barred, contrary to its earlier holding on the motion to dismiss. Both claims were focused on the City's preferential treatment of non-conforming signs that were erected with a permit. However, as with the procedural due process claim, the court concluded that the August 1997 notice of violation put the plaintiffs on notice that the City was not treating the non-permitted sign as grandfathered. "Though the Zoning Administrator did not officially deny Whiteco's 1998 permit application until April 21, 1998, Plaintiffs knew the circumstances that support the claim they are presenting here--i.e., the differential treatment of permitted and non-permitted legal, non-conforming signs--by September 1997" when Heerey's attorney forwarded the 1997 violation notice to Whiteco. R. 126 at 12. Therefore, GASS was obliged to file suit on these claims no later than September 1999, which it did not. *Id.* The court ruled alternatively that the claims failed on their merits. The premise of these claims was that because no permit was required when GASS erected its sign, the sign constituted a legal, non-conforming use

just as if it had been erected with a permit. For that reason, in GASS's view, it was irrational to treat permitted signs differently from non-permitted signs for purposes of the grandfather provision. But GASS was wrong in characterizing its sign as a legal non-conforming use, the court found. Although a permit was not required when Heerey installed the first sign in 1962, a permit was required when he later illuminated and enlarged the sign, and a permit had never been obtained. *Id.* at 16-17. GASS rejoined that the permit requirement as it existed at those times amounted to an unconstitutional prior restraint on speech and should be treated a nullity (rendering its non-permitted sign legal) but the court was not convinced. "Plaintiffs have not explained how Chapter 86.1, which at all relevant times applied to all illuminated signs and not just to advertising signs, constitutes a regulation of commercial speech sufficient to implicate the First Amendment." *Id.* at 17.

GASS moved to amend the judgment, challenging the court's rationale in disposing of the substantive due process claims, but the court denied the motion. The court reiterated that GASS was made aware by the 1997 violation notice that the City would not deem its sign covered by the grandfather clause, thus obligating GASS to file suit no later than 1999. R. 144, 2006 U.S. Dist. LEXIS 36321, 2006 WL 1460017, at *2-*3. As to the merits, the court again rejected GASS's contention that the permit requirement, as it existed in the 1960s and 1970s when GASS's sign was illuminated and then expanded, constituted an unlawful prior restraint on speech. The court pointed out that a key danger posed by licensing schemes that grant unfettered discretion to government officials is that a potential speaker will be

intimidated into censoring his own speech. *Id.* at *4 (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759, 108 S. Ct. 2138, 2144, 100 L. Ed. 2d 771 (1988)). That danger was not implicated here: the permit applied only to illuminated signs, leaving non-illuminated signs open as an alternative outlet for unregulated speech; and, at the same time, the permit requirement applied to all illuminated signs, drawing no distinctions between commercial and non-commercial speech. *Id.* at *5. Finally, the court rejected as untimely GASS's argument, made in a supplemental brief in support of the motion to am end, that it retained, at a minimum, a vested property interest in the sign in a non-illuminated, unenlarged state given that no permit was required when Heerey first erected the sign in 1962. "This is the first time that Plaintiffs have claimed a property interest in the Wall Sign other than as currently configured, and Plaintiffs make no attempt to explain why they failed to raise this claim . . . previously." *Id.* The court noted alternatively that GASS had never firmly established that its sign as originally erected truly complied with all applicable ordinances. *Id.* The court had assumed that the sign was consistent with the pre-1990 version of the zoning ordinance, but GASS had never actually proven to the satisfaction of the court that the sign was in fact legal in its non-illuminated, non-enlarged state. *Id.*

II.

A. Substantive Due Process

GASS has asserted two claims for deprivation of its Fourteenth Amendment right to substantive due process.

See generally County of Sacramento v. Lewis, 523 U.S. 833, 840, 118 S. Ct. 1708, 1713-14, 140 L. Ed. 2d 1043 (1998).

The claim that a person is entitled to "substantive due process" means, as we understand the concept, that state action which deprives him of life, liberty, or property must have a rational basis--that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as "arbitrary."...

Jeffries v. Turkey Run Consol. Sch. Dist., 492 F.2d 1, 3-4 (7th Cir. 1974) (Stevens, J.). *See also Indiana Land Co. v. City of Greenwood*, 378 F.3d 705, 711 (7th Cir. 2004).

Both of GASS's due process claims are premised on the notion that its sign was an established and lawful use of its property before the City's zoning ordinance was modified in 1990 to prohibit advertising signs within 250 feet of a residential district, and that, consequently, GASS has a vested property interest in continuing to display its sign of which it may not be deprived without substantive due process. For purposes of a due process claim, property interests are created and defined by an independent source, such as a contract or state law. *E.g., Miyler v. Vill. of E. Galesburg*, 512 F.3d 896, 898 (7th Cir. 2008) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). Illinois case law recognizes that a property owner can acquire a property interest in continuing a land use that was lawful when commenced and rendered unlawful (i.e., non-conforming) only by a subsequent legislative enactment. *See Taylor v. Zoning Bd. of Appeals of City of Evanston*, 375 Ill. App. 3d 585,

874 N.E.2d 927, 933, 314 Ill. Dec. 562 (Ill. App. Ct. 2007) (coll. cases).

Once a landowner obtains such a state-created property right, the due process clause of the Fourteenth Amendment circumscribes, but does not eliminate, the government's ability to deprive him of that interest. As we observed in *Lee v. City of Chicago*, "[S]ubstantive due process is not 'a blanket protection against unjustifiable interferences with property.'" 330 F.3d 456, 461 (7th Cir. 2003) (quoting *Schroeder v. City of Chicago*, 927 F.2d 957, 961 (7th Cir. 1991)). And it does not confer on federal courts a license to act as zoning boards of appeals. *Ctrs., Inc. v. Town of Brookfield, Wis.*, 148 F.3d 699, 704 (7th Cir. 1998); *Albiero v. City of Kankakee*, 122 F.3d 417, 420 (7th Cir. 1997). It is instead a modest limitation that prohibits government action only when it is random and irrational. "Unless a governmental practice encroaches on a fundamental right, substantive due process requires only that the practice be rationally related to a legitimate governmental interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." *Lee*, 330 F.3d at 467 (citing *Washington v. Glucksberg*, 521 U.S. 702, 728, 117 S. Ct. 2258, 2271, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)). A property owner challenging a land-use regulation as a violation of due process is therefore obliged to show that the regulation is arbitrary and unreasonable, bearing no substantial relationship to public health, safety, or welfare. *E.g.*, *Greater Chicago Combine & Ctr., Inc. v. City of Chicago*, 431 F.3d 1065, 1071 (7th Cir. 2005). And because the right infringed upon is an interest in property rather than life or liberty, the property owner must first establish either an independent

constitutional violation or the inadequacy of state remedies to redress the deprivation before a court will consider whether the interference with property is arbitrary or irrational. *Lee*, 330 F.3d at 467.

In this case, GASS contends that the City's conduct in prohibiting its sign was arbitrary and irrational in two ways. It contends first that the application of the zoning ordinance failed to promote the public health, safety, morals, and/or welfare because it arbitrarily grandfathered advertising signs that had been erected pursuant to a perm it but not signs for which no permit had been required. (Count III.) Second, it contends that the City's application of the zoning ordinance was apparently retroactive, resulting in an infringement of GASS's vested property rights in a harsh and oppressive manner. Specifically, GASS notes that the City demanded in 1997 that it obtain a permit for a sign that had been erected some thirty years earlier, but then denied GASS's application for a permit based on current zoning restrictions that did not exist when the sign was installed. (Count IV.)

There is an initial question as to the timeliness of these claims. The district court concluded, and the City argues here, that the 1997 notice of violation was sufficient to put Heerey and GASS on notice that it intended to treat permitted and non-permitted signs differently for purposes of grandfathering, and thus supplied the plaintiffs with all of the information they needed in order to assert a due process claim. Under that view, GASS was obliged to file suit no later than 1999, within the two-year statute of limitations for section 1983 claims that we have borrowed from Illinois law. *See, e.g., Jenkins v. Vill. of Maywood*, 506 F.3d 622,

623 (7th Cir. 2007). GASS replies that it was not yet clear in 1997 that the City would not belatedly grant the plaintiffs a permit for the sign; indeed, in 1995, the City zoning department had signaled an inclination to grant such a permit when its employee Merritt characterized the sign as a legal non-conforming use. GASS also makes a more fundamental contention that because it seeks only declaratory and injunctive relief (its sign still exists today, so it has yet to suffer any injury for which it might seek compensation), its substantive due process claims are not subject to a statute of limitations. *See Lavey v. City of Two Rivers*, 994 F. Supp. 1019, 1023 (E.D. Wis. 1998) (rejecting argument that section 1983 challenge to local sign ordinance was untimely, noting that plaintiff sought only declaratory and injunctive relief), *judgment aff'd*, 171 F.3d 1110 (7th Cir. 1999); *cf. Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991) (cited in *Lavey* ("it is doubtful that an ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory limitations period"); *Maldonado v. Harris*, 370 F.3d 945, 955 & n.6 (9th Cir. 2004) (seconding Fourth Circuit's doubts and collecting district court cases in like vein).

We need not resolve the timeliness question. The expiration of the statute of limitations is an affirmative defense that does not affect our subject matter jurisdiction to hear the case. *E.g.*, *Jogi v. Voges*, 480 F.3d 822, 836 (7th Cir. 2007). We may assume that even if GASS's claim is subject to a two-year statute of limitations, the limitations period did not begin to run when Heerey received the 1997 notice of limitation, as it was not yet clear at that time that the City would refuse to grant a permit for the sign. But even if we

assume that the due process claims are timely, they nonetheless fail on their merits.

Intrusion upon a cognizable property interest is a threshold prerequisite to a substantive due process claim of the type that GASS asserts. *See, e.g., Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59, 119 S. Ct. 977, 989, 143 L. Ed. 2d 130 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'"); *Swartz v. Scruton*, 964 F.2d 607, 609 (7th Cir. 1992); *Garza v. Miller*, 688 F.2d 480, 485 (7th Cir. 1982). "In other words, no abstract right to substantive due process exists under the Constitution." *Zorzi v. County of Putnam*, 30 F.3d 885, 895 (7th Cir. 1994). Consequently, the lack of a protected property interest is fatal to a substantive due process claim. *Id.* at 894.

GASS's substantive due process claims, as we have said, are premised on the notion that because its advertising sign constituted a legal use of its property prior to the 1990 amendments to the Chicago zoning ordinance, GASS has a protected property interest in continuing this prior, legitimate, albeit now non-conforming, use of the property. This might be true of the original, non-illuminated sign that Heerey first had painted on his building in 1962. Although that sign was painted on the building without a permit, the district court determined or assumed that the relevant provisions of the zoning ordinance and electrical code did not require a permit for such a sign, and we (like the parties) have accepted her ruling in that regard as correct. Consequently, the sign in its original form arguably constituted a prior non-conforming use in which GASS has a protected property interest and of

which it may not be deprived arbitrarily. And GASS, of course, contends that it is arbitrary and irrational for the City to treat as grandfathered signs that were erected with a permit but not signs, like its own, that were lawfully erected without a permit.

But even granting that GASS may have had a protected property interest in the original, non-illuminated sign, it could not have acquired such an interest in the later manifestations of the sign. When Heerey illuminated the sign in the late 1960s, and when he expanded the sign in the 1970s, he was obligated by the express terms of the City's electrical code to obtain a permit, which, so far as the evidence reveals, he did not do. Thus, the expanded and illuminated sign that existed in 1990, when the City amended the zoning ordinance to prohibit advertising signs within 250 feet of a residential district, was not an authorized use of the property that GASS had any protected interest in continuing as a legal non-conforming use. *Taylor*, 874 N.E.2d at 933 (citing *Wright v. County of DuPage*, 316 Ill. App. 3d 28, 736 N.E.2d 650, 659, 249 Ill. Dec. 456 (Ill. App. Ct. 2000)); *City of Marengo v. Pollack*, 335 Ill. App. 3d 981, 782 N.E.2d 913, 917, 270 Ill. Dec. 354 (Ill. App. Ct. 2002). And absent a protected property interest in the sign, GASS's substantive due process claims necessarily fail. *E.g.*, *Zorzi*, 30 F.3d at 895.

GASS does not dispute that the terms of the electrical code required Heerey to obtain a permit when he illuminated and expanded the sign, but GASS argues that the permit requirement itself was constitutionally invalid. Specifically, GASS contends that the permit requirement amounted to an invalid prior restraint on speech (as advertising, the sign constituted commercial

speech, *see Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882, 2889, 69 L. Ed. 2d 800 (1981) (plurality)), in that the relevant terms of the permitting scheme placed no limits on the City's discretion to deny a permit nor any time constraints on the City's decision to grant or deny a permit. *See generally FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-27, 110 S. Ct. 596, 604-05, 107 L. Ed. 2d 603 (1990) (plurality); *Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002); *see also, e.g., Solantic LLC v. City of Neptune Beach*, 410 F.3d 1250, 1272 (11th Cir. 2005) (permitting scheme for signs amounted to unconstitutional prior restraint given lack of time limits on city's obligation to act on permit applications); *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818-19 (9th Cir. 1996) (sign permit ordinance constituted unlawful prior restraint in view of city's unbridled discretion to deny sign permits). GASS adds that the permit application itself requested information about the content of the proposed sign (inquiring, for example, what the "sign will read"), suggesting that the City may have been making content-based decisions about which permit applications it would grant and which it would deny.[7] In any case, given the asserted defects in the permitting scheme as it existed when Heerey illuminated and expanded the sign, GASS contends that the permit requirement should be treated as a nullity with which Heerey was not obligated to comply. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 89 S. Ct. 935, 939, 22 L. Ed. 2d 162 (1969) ("a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of free expression for which the law purports to require a license").

We may accept without deciding that the features of the City's permitting scheme on which GASS has focused indeed rendered the permit requirement incompatible with the First Amendment, such that Heerey was entitled to ignore it. Indeed, Heerey *did* ignore it. So far as the record reveals, he not only never obtained a permit authorizing him to illuminate and then expand the sign on his building, but never bothered applying for one; nonetheless, he proceeded to illuminate and enlarge the sign. His speech, or more properly, that of his lessees, was never restrained. Of course, this does not preclude GASS from attacking the validity of the permit requirement. *Shuttlesworth*, 394 U.S. at 151, 89 S. Ct. at 939. But the question for us is whether, by virtue of the defects in the permitting scheme as it existed in that time period, Heerey and GASS also obtained a protected property interest in the sign as a lawful, non-conforming use, just as if Heerey had obtained a permit or as if the electrical code had not required a permit for the illumination or expansion of an existing sign.

Our decision in *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 914, 169 L. Ed. 2d 786 (2008), decided shortly after we heard argument in this case, reveals that the answer to this question is no. The plaintiff in *Petra* was a religious congregation that had purchased a warehouse in the hopes of converting the facility into a church. The property was located in an area of a suburban Chicago village that was zoned for industrial use. Although a 1988 zoning ordinance permitted other membership organizations, including community and youth centers, fraternal associations, and political clubs, to operate facilities in an industrial district, the

ordinance did not allow a church to locate there absent rezoning of the property and issuance of a special use permit. Before purchasing its property, Petra applied for the necessary rezoning and permit. However, after neighboring landowners voiced opposition to the request, the local planning commission recommended to the village board of trustees that the application be denied, and the trustees signaled their inclination to acquiesce in the commission's advice. Before the denial could be formalized, Petra withdrew its application but it nonetheless proceeded to purchase the property and, without authorization, began using the warehouse as a church. In the meantime, Congress had enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which among other things prohibits a local government from imposing or implementing a land use regulation that "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). Fearing that its 1988 ordinance might be invalid under RLUIPA because it treated religious organizations less favorably than other membership organizations in terms of their ability to operate in an industrial district, the village in 2003 adopted a revised ordinance that banned all membership organizations from industrial districts. Existing organizations were grandfathered, but Petra, which had never received permission to operate a church in the industrial district, was not. After the new ordinance was enacted, the village sought and obtained an injunction in state court effectively barring Petra from conducting worship services in its facility. The plaintiff filed suit in federal court under RLUIPA and lost in the district court.

Among other arguments, Petra contended on appeal that although it had never obtained the requisite rezoning and permit to operate a church within the industrial zone of the village, it nonetheless had obtained a vested interest in continuing to operate a church there. Petra claimed that when it bought the property, it was relying on the invalidity of the 1988 zoning ordinance, which by treating religious organizations less favorably than other membership organizations violated not only RLUIPA but the free-exercise clause of the First Amendment. By virtue of that reliance, Petra maintained that it had obtained an indefeasible right to use the warehouse for a church. So in Petra's view, even if the zoning ordinance enacted in 2003 barring all membership organizations from the industrial zone were valid, Petra would still have the right to operate its church there like any other grandfathered organization--in other words, as if it had obtained the village's permission to do so in the first instance.

We categorically rejected the notion that Petra could have acquired any right to operate a church in reliance on the invalidity of the zoning ordinance that was in effect when it purchased the property and established its church:

> We cannot find any basis, whether in cases or other conventional sources of law, or in good sense, for the proposition that the federal Constitution forbids a state that has prevented a use of property by means of an invalid (even an unconstitutional) enactment to continue to prevent that use by means of a valid one. From the proposition that the Village should not have

discriminated in the industrial zone in favor of secular membership organizations it does not follow that when it eliminated the discrimination by banning all membership from the zone, this entitled the victim of the discrimination to claim, by way of remedy, discrimination in *its* favor. So strange a rule of estoppel could hardly be thought an imperative of due process, especially since, although property rights are protected (to a degree) by the due process clauses of the Constitution, the scope of those rights is determined by state law within broad limits that include the conditions under which a governmental act can render a property right indefeasible. *Crown Media, L.L.C. v. Gwinnett County*, 380 F.3d 1317, 1325 & n.18 (11th Cir. 2004); *Coral Springs Street Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1333 (11th Cir. 2004); *Lakeview Dev. Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1294-95 (9th Cir. 1990).

And if there were such a rule of constitutional law ("vesting by estoppel"), it would be inapplicable to this case. If the 1988 ordinance violated RLUIPA, as Northbrook comes close to conceding, Petra didn't have to comply with it. But that doesn't mean that it acquired an immunity from *all* zoning regulation. It knew or should have known that Northbrook could redo its ordinance to comply with the "less than equal terms" provision of RLUIPA in one of two ways: by permitting religious organizations in the industrial zone, or by forbidding all membership organizations in the zone. Petra could not reasonably assume that the Village would choose

> the first option. And since it therefore did not *reasonably* rely on the illegality of the 1988 ordinance in going ahead and buying the property, but instead assumed the palpable risk that a new, valid ordinance would continue the ban on its desired use of the property, it has no ground for blocking the Village from enforcing the amended ordinance against it, on the theory that the Village pulled the rug out from under it by changing the ordinance.

489 F.3d at 849 (emphasis in original).

GASS finds itself in essentially the same position as the plaintiff in *Petra*. GASS wishes to continue using its property in a manner that the current version of the City's zoning ordinance prohibits, because its sign is larger than 100 square feet and is within 250 feet of a residential district.[8] GASS's only means of preserving its sign is to establish that the sign was a lawful use prior to the zoning change. The problem for GASS, as it was for Petra, is that neither GASS nor Heerey ever obtained the permits that were required for its use; Heerey illuminated and expanded the sign without even seeking a permit. So even before the current zoning took effect, GASS's sign, like Petra's church, was an *unauthorized* use of its property. GASS cannot claim a protected interest in continuing to display advertising that, once illuminated and expanded, was illegal from the start. To circumvent that obstacle, GASS seeks to rely on constitutional defects in the permitting scheme in effect in the 1960s and 1970s, contending that these defects rendered the permit requirement a nullity and rendered its illuminated and expanded sign a lawful use of the property

notwithstanding its lack of the requisite permits for such a sign. GASS, just like the plaintiff in *Petra*, is retrospectively relying on the supposed illegality of former incarnations of the zoning ordinance to transform its unlicensed use of property into an authorized use and to give it a property interest in continued use of that property despite subsequent changes to the zoning code. GASS's creative bootstrapping effort fails for precisely the same reasons that Petra's did.

We note that, consistent with our decision in *Petra*, Illinois cases also reject the notion that a property owner may rely on purported defects in prior versions of the law as the springboard to claim a vested interest in a property use for which it never obtained permission. As the court reasoned in *City of Elgin v. All Nations Worship Ctr.*, 369 Ill. App. 3d 664, 860 N.E.2d 853, 857, 308 Ill. Dec. 9 (Ill. App. Ct. 2006):

> [V]ested rights are acquired by attempting to comply with an ordinance as written . . . . [W]hen a party expends substantial time and effort attempting to comply with an ordinance as it then exists and then the legislative body amends the ordinance, the party may acquire a vested right to proceed under the old ordinance. [Citation omitted.] Here, however All Nations proceeded *in violation* of the zoning ordinance as written. It is difficult to see how All Nations can claim a vested right to ignore the existing ordinance. (Emphasis in original.) *See also Nat'l Adver. Co. v. Vill. of Downers Grove*, 561 N.E.2d 1300, 1304-05 (Ill. App. Ct. 1990). As it is Illinois law to which GASS must look for a property

right, these holdings confirm that GASS lacks the requisite basis for a due process claim.

As a fallback, GASS contends that at the very least, it has a protected property interest in continuing to display a smaller, non-illuminated sign on its building. Because, as the district court assumed, no permit was required for the sign or signs Heerey originally had painted on his building in the early 1960s, that type of sign was an authorized use and GASS argues that it may assert a right to display at least that type of advertising, even if it has no claim to the larger, illuminated sign for which it never sought the requisite permits.

But this is an argument that GASS made too late in the day. GASS first advanced this argument in a meaningful way in its supplement to its post-trial motion under Rule 59 to amend the judgment. R. 131. Arguments that could have been made earlier but are instead raised for the first time in a Rule 59 motion are waived. *E.g.*, *Estremera v. United States*, 442 F.3d 580, 587 (7th Cir. 2006). The argument was hinted at parenthetically in the pretrial order's recitation of GASS's proposed legal conclusions (*see* R. 111 Ex. L at 8 P44), and again in the opening statement that GASS's lawyer made at trial, R. 166 at 16, but those references alone were insufficient to alert either the City or the court to the argument that GASS finally developed and supported in the supplement to its Rule 59 motion. As the district court noted, GASS offered no explanation for its tardiness in pursuing this argument. R. 144, 2006 WL 1460017, at *5. We do not reach the merits of the argument, concluding that GASS waived it.

Because GASS has not established that its sign was lawful before the 1990 zoning change that banned advertising signs within 250 feet of a residential district, it has no protected property interest in the sign that would support a substantive due process claim. On that basis, we affirm the entry of judgment against GASS and in favor of the City on the substantive due process claims set forth in Counts III and IV of GASS's second amended complaint.

B. Procedural Due Process

In a cursory argument spanning all of two paragraphs in its opening brief (GASS Br. at 43-44), GASS argues that the district court incorrectly dismissed as untimely its procedural due process claim. The argument is so brief that GASS has waived it. *See, e.g., Robinson v. Alter Barge Line, Inc.*, 513 F.3d 668, 675 (7th Cir. 2008). GASS does not even set out the elements of a procedural due process claim. *See Mema v. Gonzales*, 474 F.3d 412, 421 (7th Cir. 2007); *Estate of Allen v. City of Rockford*, 349 F.3d 1015, 1022 n.9 (7th Cir. 2003).

C. First Amendment

Finally, GASS contends that its complaint alleged a valid claim for the threatened and impending denial of its First Amendment right to free speech based on the commercial content of the sign. Recall that the district court dismissed this claim because the focus of GASS's challenge was not on a provision of the zoning ordinance having to do with the nature or content of the sign, but rather on the grandfather provision of the ordinance which allowed non-conforming signs erected pursuant to a permit to remain after the 1990 zoning changes but

not signs erected without a permit. That provision, the court pointed out, applied to all signs, not just advertising signs; consequently, GASS's claim did not in fact have to do with the regulation of commercial speech. Moreover, as a challenge to the grandfather provision, the court viewed this claim as simply a restatement of GASS's substantive due process claims. "Plaintiffs cannot convert what is essentially a due process claim into one under the First Amendment merely by noting that theirs is an advertising sign." R. 93, 2004 WL 442636, at *5.

GASS contends that the district court overlooked the First Amendment implications of its challenge. Although the grandfather provision found in section 6.7-1(a) of the zoning ordinance applies to a variety of signs, not just those displaying advertising, as relevant here it operates as an exemption from the limits imposed by section 8.9(7) of the ordinance, which prohibits advertising signs in excess of 100 square feet from being within 250 of a residence district. "The regulation at issue, therefore, is a regulation of commercial speech." GASS Amended Br. 46. As such, GASS reasons, it must be scrutinized under the four-part test for regulation of commercial speech set forth in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Com'n of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980). That test requires in part that a restriction on legitimate, non-misleading commercial speech must be designed to advance a substantial government interest. *See* 447 U.S. at 564, 100 S. Ct. at 2350. GASS contends that the City has no legitimate interest in grandfathering non-conforming advertising signs that were erected pursuant to a permit but not those, like its own, that were erected without one; that distinction, in

GASS's view, is irrational and arbitrary. GASS Amended Br. 47. It likens the distinction to the one that the City of Cincinnati drew between the use of newsracks on the public way to distribute commercial bills, which the city prohibited, and the use of such racks to distribute newspapers, which the city allowed. The Supreme Court deemed that distinction unconstitutional in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993), finding there to be no reasonable fit between the city's interest in aesthetics and safety and its decision to ban only those newsracks distributing commercial bills.

Try as it might, GASS has not succeeded in stating a claim for the regulation of commercial speech. True enough, section 8.9(7) of the zoning ordinance is a regulation of commercial speech, in that it specifically bans advertising signs larger than 100 square feet from being located within 250 feet of a residence district. But GASS does not contend that the constitutionality of section 8.9(7) itself is suspect. It does not even analyze section 8.9(7) pursuant to the *Central Hudson* test. Its attack, as the district court recognized and as GASS's appellate brief makes plain, is on the grandfather provision of section 6.7-1(a), and the differing treatment that provision grants to previously permitted signs as distinct from signs that were enacted without a permit. Yet, the grandfather provision is not a provision that is triggered by the commercial content of the sign in question. As GASS concedes, section 6.7-1(a) applies to all manner of signs, not just advertising signs. As such, we agree with the City that the grandfather provision is a content-neutral time, place, and manner restriction on speech rather than a regulation of commercial

speech. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 428, 113 S. Ct. 1505, 1516, 123 L. Ed. 2d 99 (1993); *see also, e.g., Solantic LLC v. City of Neptune Beach, supra*, 410 F.3d at 1268 n.15.

The City has gone on to analyze the grandfather provision as a time, place and manner restriction, but GASS itself has made no argument that the provision is unconstitutional under that framework, thereby waiving any such contention. For these reasons, we believe the district court correctly dismissed GASS's First Amendment claim.

III.

GASS has reaped hundreds of thousands of dollars in revenues from its sign despite the fact that the sign has been unauthorized for the past three or more decades. Those days are at an end. Because GASS's predecessor Heerey failed to obtain the requisite permits to illuminate and then expand the sign in the 1960s and 70s, the sign was not a legal land use that gave rise to a protected property interest. Absent such a vested property right, GASS cannot mount a substantive due process challenge to the 1990 amendments to the City's zoning ordinance, which prohibited signs as large as GASS's within 250 feet of a residential district and grandfathered only those existing, non-conforming signs which had been erected pursuant to a permit. GASS has not shown how the First Amendment is implicated by the content-neutral provisions of the 1990 grandfather provision. GASS's procedural due process claim has been waived. For all of these reasons, we AFFIRM the district court's judgment.

Footnote

[1]The name of the corporation was a holdover from a time when Heerey and his parents owned an automobile parts business on Chicago's north side. Heerey closed that business in the 1960s.

[2]Although GASS's counsel indicated at trial that the plaintiffs believed Heerey did obtain a permit for illumination of the sign, he conceded that GASS had been unable to locate any such permit. R. 166 at 15, 23.

[3]In 2004, the City eliminated the distinction for grandfathering purposes between permitted and non-permitted signs. Section 6.7-1(a) was repealed and replaced by two new provisions, found at sections 17-15-0502 and 17-15-0503 of Chicago's Municipal Ordinance, which collectively perm it a non-conforming sign to remain in use so long as the sign complied with the zoning and sign regulations in effect at the time the sign was established. As it is section 6.7-1(a) that is relevant for purposes of GASS's appeal, we shall refer exclusively to this section and speak of it in the present tense, although it has since been superseded.

[4]There is a dispute between the parties as to whether the City opposed GASS's petition for leave to intervene in Whiteco's suit. We were led to believe in *Gen. Auto Serv. Station LLC v. City of Chicago*, 319 F.3d 902, 905 (7th Cir. 2003), which we discuss below, that the City actively had opposed GASS's petition. The City contends that we were mistaken in that regard, although GASS and the other appellants do not share that view. We need not resolve this dispute for purposes of the instant appeal.

[5]GASS filed the second amended complaint with the district court's permission after the bench trial had concluded, in order to conform the allegations to the evidence. For the sake of convenience, we shall refer to that version of the complaint,

[6]In addition to its federal claims, GASS asserted parallel state claims under the pertinent provisions of the Illinois Constitution, although the state claims have not been discussed on appeal. Illinois courts apply a limited version of the lockstep doctrine, adhering to U.S. Supreme Court precedent concerning the federal constitution when interpreting cognate provisions of the state constitution. *See People v. Colon*, 225 Ill. 2d 125, 866 N.E.2d 207, 223, 310 Ill. Dec. 396 (Ill. 2007) (citing People v. Caballes, 221 Ill. 2d 282, 851 N.E.2d 26, 42, 303 Ill. Dec. 128 (Ill. 2006)). In the absence of any argument to the contrary, we may assume that our analysis as to GASS's federal constitutional claims would also apply to its state constitutional claims.

[7]We note, however, that GASS relies for this point on the permit applications Whiteco completed in 1994 and 1997, App. 113A, 118, rather than on any proof as to what information the permit applications required in the 1960s and 1970s.

[8]No question is raised as to the validity of the current prohibition.

No. 00 C 368

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

GENERAL AUTO SERVICE STATION, an Illinois corporation, F.A.Y. PROPERTIES, INC., an Illinois corporation, and COSMOPOLITAN BANK AND TRUST, SUCCESSOR TO THE COSMOPOLITAN NATIONAL BANK OF CHICAGO, not individually but as trustee under trust agreement dated December 21, 1994 and known as trust # 27340,
Plaintiffs,

v.

THE CITY OF CHICAGO, a municipal corporation, and LAMAR ADVERTISING COMPANY, a Delaware corporation, of itself and d/b/a Lamar Whiteco Outdoor Corporation,
Defendants.

May 23, 2006, Decided

JUDGES: REBECCA R. PALLMEYER, United States District Judge.

MEMORANDUM OPINION AND ORDER

Plaintiffs General Auto Service Station, F.A.Y. Properties, Inc. and Cosmopolitan National Bank of Chicago, owners of a large commercial sign in Chicago (the "Wall Sign"), allege that the City of Chicago's (the "City") efforts to enforce a zoning regulation that

prohibits such signs within 250 feet of a residential district violate Plaintiffs' substantive-due-process rights. [*2] After a bench trial, the court concluded that Plaintiffs' action was barred by the two-year statute of limitations applicable to Plaintiffs' 42 U.S.C. § 1983 claims, and, even if it was not time-barred, Plaintiffs' action failed on its merits. Plaintiffs have moved this court pursuant to FED. R. CIV. P. 59 to amend and modify its judgment, challenging both determinations. First, Plaintiffs argue that this court erroneously concluded that their substantive-due-process claims accrued more than two years before Plaintiffs filed this action. Second, Plaintiffs contend that Chapter 86 of the City's Municipal Code, requiring a permit before illuminating or enlarging commercial and non-commercial signs, constitutes an unlawful prior restraint, and consequently cannot be a basis for denying the Wall Sign legal, non-conforming status under the current Zoning Ordinance. Finally, Plaintiffs argue that the Wall Sign should not be removed entirely, even if it violates Chapter 86, because Plaintiffs retain a protected property interest in the Sign as it existed before Plaintiffs violated the ordinance. For the following reasons, the [*3] court denies Plaintiffs' motion.

BACKGROUND

The facts of this case are presented in this court's April 22, 2005 Memorandum Opinion and Order, *see* Memorandum Opinion and Order, No. 00 C 0368 (N.D. Ill. 2005) (hereinafter, "April 2005 Order"), its May 21, 2001 and March 9, 2004 Memorandum Opinion and Orders, *see General Auto Serv. Station v. City of Chicago*, 2001 U.S. Dist. LEXIS 23711, No. 00 C 368,

2001 WL 558 148 (N.D. Ill. May 21, 2001) (*General Auto I*) and *General Auto Serv. Station v. City of Chicago*, 2004 U.S. Dist. LEXIS 3800, No. 00 C 368, 2004 WL 442636 (N.D. Ill. Mar. 9, 2004) (*General Auto II*), and in the Seventh Circuit's decision in *General Auto Serv. Station LLC v. City of Chicago*, 319 F.3d 902 (7th Cir. 2003). This opinion assumes the reader's familiarity with those decisions.

In its April 2005 Order, this court concluded that Plaintiffs' substantive-due-process claims accrued in September 1997, more than two years before Plaintiffs filed the present action, when Plaintiffs received a violation notice stating: "[o]btain permit for outdoor flat building sign installed without permit." *See* April 2005 Order at 12. The court nevertheless went on to [*4] address the merits of Plaintiffs' claims "[i]n light of the City's extended delays in enforcing the Zoning Ordinance." *Id.* According to Plaintiffs, the 1990 Zoning Ordinance's "grandfather clause" arbitrarily and irrationally distinguished between signs "lawfully erected pursuant to a permit," which were exempt from amended Zoning Ordinance § 8.9(7), and those signs "lawfully erected" without a permit, or before any such permit was required. *Id.* at 13. Without reaching the issue of whether this distinction was rational, this court determined that Plaintiffs had not met their burden to demonstrate that the Wall Sign had been erected lawfully. *Id.* Even assuming that the Wall Sign did not violate the pre-1990 Zoning Ordinance, *see id.* at 15, the court concluded that Plaintiffs had failed to obtain a permit before illuminating, then enlarging the Wall Sign. *See id.* at 16-17. Accordingly, the Wall Sign "was not lawfully erected as of the date it was illuminated," and the court entered judgment in favor of the City on

Plaintiffs' substantive-due-process claims. *Id.* at 17. Plaintiffs filed their Rule 59 motion to alter and amend the judgment on May 6, 2005, and [*5] filed a "Supplement" to that motion on May 10, 2005.

DISCUSSION

A. The Rule 59 Standard

To prevail on their Rule 59 motion, Plaintiffs must point to evidence in the record that "clearly establishes a manifest error of law or fact." *See County of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 819 (7th Cir. 2006) (internal quotations omitted). [1] A Rule 59 motion is not a vehicle for advancing "arguments or theories that could and should have been made" prior to judgment, *id.* (internal quotations omitted), nor is it "an appropriate forum for rehashing previously rejected arguments." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996). Plaintiffs' Motion to Amend largely rehashes arguments presented in their post-trial brief, arguments which this court either explicitly or implicitly rejected. Even if the court were to overlook this defect, the court is not persuaded that the record clearly establishes a manifest error of law or fact.

B. The Statute of Limitations

Plaintiffs contend that this court incorrectly determined that Plaintiffs' substantive-due-process claims accrued in September 1997, more than two years before Plaintiffs filed this lawsuit, when the City notified Whiteco Outdoor Advertising ("Whiteco"), Plaintiffs' lessee, that the Wall Sign lacked a necessary

permit. *See* April 2005 Order at 12. Instead, Plaintiffs argue--as they did in their post-trial brief--that the proper accrual date is April 21, 1998, when the City denied Whiteco's permit application. *See* Pls.' Motion to Amend and Modify the Court's Memorandum, Opinion and Order of April 22, 2005 Entering Judgment in Favor of the City of Chicago (hereinafter, "Motion to Amend") Par. 3; Pl.'s Post Trial Brief and Final Argument (hereinafter, "Pls.' Post-Trial Br.") Par. 69. This court previously rejected this argument, and Plaintiffs have not adduced any new evidence requiring the court to revisit that determination. Plaintiffs' substantive-due-process claims accrued when Plaintiffs knew or should have known that their constitutional rights had been violated. *Behavioral Institute of Indiana, LLC v. Hobart City of Common Council*, 406 F.3d 926, 929 (7th Cir. 2005). [*7] The September 1997 Violation Notice's plain language required Whiteco to obtain a permit, even though its non-permitted sign was purportedly "legal" under ordinances in place at the time it was erected and subsequently modified. At this point, Plaintiffs were aware that the City would not allow the Wall Sign to remain in place without a permit. Under Plaintiffs' theory of the case, the Zoning Ordinance, which codifies the challenged permit requirement, is itself arbitrary and irrational. It would not have been any less arbitrary and irrational had the City granted rather than denied Whiteco's permit request. [2]

Contrary to Plaintiffs' assertions, the Seventh Circuit's earlier decision in this case does not require a different result. Motion to Amend at 3. In concluding that this court had erred in dismissing Plaintiffs' complaint pursuant [*8] to *Younger v. Harris*, 401 U.S. 37, 91 S.

Ct. 746, 27 L. Ed. 2d 669 (1971), *see General Auto*, 319 F.3d at 907, Plaintiffs contend that the Court of Appeals implicitly "recognized" that Plaintiffs' claims accrued on April 21, 1998. Motion to Amend at 3; *see also General Auto*, 319 F.3d at 904. First, Plaintiffs "could and should have" made this argument prior to judgment. *County of McHenry*, 438 F.3d at 819. Second, Plaintiffs reach this conclusion only by taking language from the Seventh Circuit's opinion out of context. While the Seventh Circuit concluded that *Younger* abstention was not warranted, it did not reach the merits of Plaintiffs' claims, which were not briefed on appeal. *General Auto*, 319 F.3d at 907. On remand, this court dismissed all but two counts of Plaintiffs' complaint, then conducted a bench trial on Plaintiffs' remaining substantive-due-process claims. After the trial, the court concluded that Plaintiffs were aware in September 1997 that the City required Whiteco to obtain a permit for the Wall Sign. April 2005 Order at 11-12. As previously discussed, Plaintiffs knew or should have known at that point that their [*9] constitutional rights were violated in the manner alleged.

Plaintiffs also rehash their alternative argument that their rights accrued only when the state court denied their motion to intervene. *See* Motion to Amend at 3-5; Pls.' Post Trial Br. Par. 72. Plaintiffs' argument, for which they have not cited any legal authority, assumes that Plaintiffs' state law remedies were adequate *until* the state court denied their motion to intervene. This is contrary to this court's holding in *General Auto II*, a holding that Plaintiffs do not challenge here. *See General Auto II*, 2004 U.S. Dist. LEXIS 3800, 2004 WL 442636, *10-11. Although not articulated as such,

Plaintiffs' argument is perhaps better understood as a request that the statute of limitations be tolled for the period October 19, 1998 (when Whiteco filed its complaint in state court) through December 29, 1999 (when the state court denied their motion to intervene). Were the court to adopt this theory, it would mean that the time for filing Plaintiffs' complaint hinged upon Plaintiffs' own conduct. The Illinois intervention statute would not have prevented Plaintiffs from moving to intervene sooner (or later, for that matter). *See* [*10] 735 Ill. Comp. Stat. 5/2-408 (2005). Absent contrary authority, the court declines to adopt Plaintiffs' counterintuitive interpretation of § 1983's statute of limitations. Plaintiffs' lawsuit, filed more than two years after their rights accrued, was untimely.

B. Substantive Due Process Claims

Although this court concluded in its April 2005 Order that Plaintiffs' substantive-due-process claims were time-barred, a conclusion that the court reaffirms here, this court nevertheless addressed the substance of those claims. *See* April 2005 Order at 12. The court concluded that the Wall Sign did not constitute a legal, non-conforming use because Plaintiffs did not obtain permits, as required by Chicago Electrical Code Section 86.1, before illuminating and then enlarging the Wall Sign sometime during the period between 1962 and 1979. *Id.* at 16-17. In response, Plaintiffs argued that the applicable portions of Chapter 86.1 are unconstitutional prior restraints, *see* Pls.' Post Trial Br. at Pars. 89-93, an argument they revisit in their motion to amend the judgment. Motion to Amend at Pars. 8-17. According to Plaintiffs, because Chapter 86.1 violated [*11] the First Amendment, and the Wall Sign

otherwise complied with applicable zoning regulations, the Wall Sign is a legal, non-conforming use. *Id.* at Pars. 8-9.

First, contrary to Plaintiffs' assertions, this argument has no bearing on the court's conclusion that Plaintiffs' substantive-due-process claims are untimely. *See* Motion to Amend at Par. 8-9. If, as Plaintiffs contend, Chapter 86.1's permit requirement is an impermissible prior restraint, then Plaintiffs have, at most, established that the Wall Sign falls within the category of legal, non-conforming signs. While this is a predicate for Plaintiffs' substantive-due-process claims, it does not alter the court's determination of the date on which those claims accrued for purposes of § 1983's statute of limitations. Whether the Wall Sign is "legal" because it complied with pre-amendment zoning laws, or, instead, is "legal" because those zoning laws were unconstitutional, the basis of Plaintiffs' substantive-due-process claims is the same: the differential treatment of permitted and non-permitted legal, non-conforming signs. As previously discussed, Plaintiffs were aware of the circumstances supporting their constitutional claims [*12] by September 1997, and, accordingly, Plaintiffs' claims are time-barred.

Even if Plaintiffs' claims were timely, the court is still not persuaded that Chapter 86.1 implicates First Amendment concerns. *See* April 2005 Order at 17. Chapter 86.1 made it unlawful to "proceed with the erection, enlargement, alteration or rehang of any illuminated sign or illumination of signboard unless a permit therefor shall have first been obtained from the Commissioner of Buildings." Chicago Elec. Code § 86.1-4(a) (1962). To support their facial challenge to this

permit requirement, Plaintiffs must demonstrate that the ordinance has a "close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat" of censorship. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988). Plaintiffs argue that Chapter 86.1's permit requirement meets this standard as it applies to advertising signs (like the Wall Sign), which are closely associated with the written word. Motion to Amend Par. 14; *see also Weinberg v. City of Chicago*, 310 F.3d 1029, 1045 (7th Cir. 2002). The court does not believe that Chapter [*13] 86.1 implicates the censorship concerns that motivated the courts in *Lakewood* and *Weinberg* to permit facial challenges to the licensing schemes considered in those cases.

In *Lakewood*, the plaintiff challenged an ordinance that gave the City of Lakewood's mayor the "authority to grant or deny applications for annual newsrack permits." *Lakewood*, 486 U.S. at 753. The *Lakewood* court permitted the plaintiff to facially challenge the ordinance, concluding that: (1) the ordinance's annual licensing requirement gave the mayor discretion to discriminate based on the probable content or viewpoint of the relevant speech; and (2) the ordinance was "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers." *Id.* at 759-60. The Court distinguished Lakewood's newsrack ordinance from laws requiring building permits, which the court characterized as "laws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the

words about to be spoken." *Id.* at 760-61. [*14] In *Weinberg*, the plaintiff challenged an ordinance stating, in relevant part, that "[n]o person, other than a licensed peddler . . . shall sell, offer or expose for sale, or solicit any person to purchase any article or service whatsoever, except newspapers, on any public way." 310 F.3d at 1043. Citing *Lakewood*, the Seventh Circuit concluded that plaintiff could facially challenge the licensing scheme because it vested unfettered discretion in city officials to issue peddling licenses. *Id.* at 1044. Moreover, the conduct at issue--the plaintiff was attempting to sell a book that he had written about the owner of a professional hockey team outside the arena where the team played--was "conduct commonly associated with expression." *Id.* at 1045.

Here, unlike in *Lakewood* and *Weinberg*, there is little if any risk that advertisers will "self-censor" commercial speech if denied a permit to erect an illuminated sign, or (as in this case) to illuminate or enlarge a preexisting sign. *See Lakewood*, 486 U.S. at 757 (a facial challenge to a licensing requirement is justified because "the mere existence of the licensor's [*15] unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."); *Weinberg v. City of Chicago*, 310 F.3d at 1044 (permitting a facial challenge to a licensing scheme because "such schemes enable officials to self-censor protected expression."). The risk of "undetectable censorship" owing to the City's alleged unfettered discretion is similarly tenuous, as Chapter 86.1 does not prohibit advertisers from erecting unilluminated signs without obtaining a permit. *Lakewood*, 486 U.S. at 762; *cf. Weinberg*, 310 F.3d at 1045 ("Prohibiting Weinberg

from selling his book prevents the message of [his book] from being disseminated."). A permit requirement that applies only to illuminated signs without distinguishing between commercial and non-commercial speech is "too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Lakewood*, 486 U.S. at 761. Accordingly, the court again rejects Plaintiffs' facial challenge to Chapter 86.1.

D. Plaintiffs' Supplemental Brief [3]

In their supplemental brief, Plaintiffs argue that, even if the Wall Sign did not comply with Chapter 86.1 in 1990 when the Zoning Ordinance was amended, the Wall Sign cannot be removed entirely because Plaintiffs have a vested property interest in their last legal use of the property before running afoul of Section 86.1. *See* Pl.'s Supp. Pars. 4-7. They cite *City of Marengo v. Pollack*, 335 Ill. App. 3d 981, 782 N.E. 2d 913, 270 Ill. Dec. 354 (2nd Dist. 2002) to support this argument. In *Marengo*, the defendant purchased property totaling 99,244 square feet in 1986, property which at that time was subject to an ordinance limiting outdoor storage to 10% of the purchased property. *See Marengo*, 335 Ill. App. 3d at 983, 782 N.E. 2d at 915. But between 1986 and 1992, when the plaintiff amended its zoning ordinance to limit outdoor storage to 1,000 square feet total, defendants continually exceeded the 10% storage limit. *Id.* The *Marengo* court concluded that the defendant was entitled to continue using 10% of its property for outdoor storage, even though it routinely exceeded that percentage before the amendment. *Id.* at 988, 782 N.E. 2d at 918. [*18] The court reasoned that 9,924 square feet of the total storage space that defendant had utilized "existed lawfully at the time

plaintiff enacted the 1992 ordinance," and, therefore, defendant was entitled to continue that legal prior use. *Id.*

This is the first time that Plaintiffs have claimed a property interest in the Wall Sign other than as currently configured, and Plaintiffs make no attempt to explain why they failed to raise this claim or cite *Marengo* previously. [4] *Cf. County of McHenry*, 438 F.3d at 819 (A Rule 59 motion is "not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment.")(internal quotations omitted). In any event, although it was Plaintiffs' burden to establish a legal non-conforming use, *see Lake County v. Zenko*, 174 Ill. App. 3d 54, 65-66, 528 N.E.2d 414, 421, 123 Ill. Dec. 869 (2nd Dist. 1988), on this record they have not established that the Wall Sign ever complied with all applicable ordinances. *See Bainter v. Village of Algonquin*, 285 Ill. App. 3d 745, 751, 675 N.E. 2d 120, 125, 221 Ill. Dec. 213 (2nd Dist. 1996) ("A use which was not lawful at its inception [*19] is not a legal nonconforming use and thus cannot be protected from elimination for violation of present zoning ordinances."). Plaintiffs were unable to pinpoint when the lights were installed above the Wall Sign, *see* Stmt. of Uncontested Facts Par. 13 (lights were installed above the Wall Sign "[a]t some point" between 1962, when the sign was erected, and 1969), and it is not clear that the Wall Sign complied with Zoning Ordinance § 8.9(5) at the time the Wall Sign was erected. *See* April 2005 Order at 15 (For purposes of the April 2005 Order, the court "assum[ed] that the 1962 Wall Sign did not violate the pre-1990 Zoning Ordinance."). [5] But whether or not the Wall Sign was "legal" at some point during its existence, Plaintiffs'

new argument does not affect the point at which their substantive-due-process claims accrued. Plaintiffs' substantive-due-process claims, whether predicated on a complete or partial deprivation of the property interest at issue, are time-barred.

CONCLUSION

Plaintiffs' Motion to Amend (128) is denied.

ENTER:

REBECCA R. PALLMEYER

United States District Judge

Footnotes

[1]Plaintiffs have not adduced any additional evidence that was not available at the time of trial. *See County of McHenry*, 438 F.3d at 819.

[2]Whether Plaintiffs would have had standing to challenge the ordinance at that point is another matter, but one which does not affect accrual of their rights in this case.

[3] On May 10, 2005, twelve business days after this court entered judgment, Plaintiffs filed a "supplement" to their Motion to Amend. *See* Pl.'s Supp. to Its Motion to Amend and Modify the Court's Judgment of April 22, 2005 (hereinafter, "Pl.'s Supp."). The City contends that Plaintiffs "waived" issues addressed in supplemental brief because that brief was filed outside Rule 59's ten-day limit. *See* Def. City of Chicago's Response to Pl.'s

Motion to Amend and Modify and Pl.'s Supp. Thereto (hereinafter "Def. 's Response") Par. 4 (citing *Talano v. Northwestern Medical Faculty Foundation, Inc.*, 273 F.3d 757, 761 (7th Cir. 2001); *Hope v. United States*, 43 F.3d 1140, 1143 (7th Cir. 1994)). In both *Talano* and *Hope*, the Seventh Circuit held that a district court may not toll FED. R. APP. P. 4's thirty-day notice-of-appeal period by accepting an untimely Rule 59 motion. *See Talano*, 273 F.3d at 760-61; *Hope*, 43 F.3d at 1143. An untimely Rule 59(e) motion does not, contrary to Defendant's assertion, "waive" (or more appropriately, "forfeit") arguments raised by the motion. *See Hope*, 43 F.3d at 1143 (motion to alter or amend judgment filed more than ten days after judgment is treated as a Rule 60 motion); *United States v. Deutsch*, 981 F.2d 299, 300-301 (7th Cir. 1992) (same); *see also United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000) ("One forfeits his rights by failing to assert them in a timely manner. Where waiver is accomplished by intent, forfeiture comes about through neglect.") (internal citations omitted). The court believes, however, that Plaintiffs' "Supplement" is just that: a supplement to Plaintiffs' timely Rule 59 motion. Accordingly, the court will assess Plaintiffs' supplemental brief under Rule 59, not Rule 60.

[4]This failure is particularly puzzling in light of the fact that the parties did discuss the possibility of reducing the size of the sign and/or removing the light fixtures during settlement negotiations. *See* Proposed Final Pretrial Order, Ex. N and O.

[5]Another problem with Plaintiffs' argument, although not determinative, is the difficulty of establishing what the reconfigured Wall Sign should look like. *Cf.*

Marengo, 335 Ill. App. 3d at 988, 782 N.E. 2d at 918 ("It is very easy here to separate the permitted use from the prohibited use."). At some point between 1975 and 1979, Plaintiffs impermissibly enlarged the illuminated Wall Sign without obtaining a permit. Stmt. of Uncontested Facts at Par. 14. Plaintiffs suggest that the sign could be "reduced in size with the lights removed" rather than removed altogether, Pl.'s Supp. at Par. 7, but it is unclear what size the sign should be reduced to.

Filed 04/22/2005
No. 00 C 368

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

GENERAL AUTO SERVICE STATION, an Illinois corporation, F.A.Y. PROPERTIES, INC., an Illinois corporation, and COSMOPOLITAN BANK AND TRUST, SUCCESSOR TO THE COSMOPOLITAN NATIONAL BANK OF CHICAGO, not individually but as trustee under trust agreement dated December 21, 1994 and known as trust # 27340,
Plaintiffs,

v.

THE CITY OF CHICAGO, a municipal corporation, and LAMAR ADVERTISING COMPANY, a Delaware corporation, of itself and d/b/a Lamar Whiteco Outdoor Corporation,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs General Auto Service Station, F.A.Y. Properties, Inc., ("F.A.Y."), and Cosmopolitan Bank and Trust, Successor to the Cosmopolitan National Bank of Chicago ("Cosmopolitan Bank"), brought this suit against Defendants the City of Chicago (the "City") and Lamar Advertising Company ("Lamar") to resolve a dispute regarding a sign painted on an exterior wall of a building located at 1127-33 North State Street in Chicago, Illinois. The City determined that the sign,

which has existed in its current location and near its current size for over 40 years, violates the City's Zoning Ordinance and must be removed. Plaintiffs claim that the ordinance is unconstitutional as applied to their property under the Fourteenth Amendment due process clause, and seek declaratory and injunctive relief allowing them to maintain the sign in its present condition The court held a bench trial on these issues and now enters judgment in favor of the City.

BACKGROUND

The facts of this case as presented in this court's May 21, 2001 and March 9, 2004 Memorandum Opinions and Orders, see General Auto Service Station v. City of Chicago, No. 00 C 358, 2001 WL 558148 (N.D. III. May 21, 2001) and General Auto Service Station v. City of Chicago, No. 00 C 888, 2004 W.L. 442888 (N.D. Ill. Mar. 9, 2004), and in the Seventh Circuit's decision in General Auto Service Station LLC v. City of Chicago, 31 F.3d 902 (7th Cir. 2003), were largely undisputed and confirmed at trial. This opinion assumes the reader's familiarity with these earlier decisions.

A. The Parties

In January 1951, Bernard Heerey purchased property located at 127-33 North State Street in Chicago, Illinois (the "Property"). Plaintiff Cosmopolitan Bank currently holds legal title to the Property under a trust agreement dated December 21, 1984, known as trust #27340 (the "Land Trust"). In 1998, Heerey assigned his beneficial ownership in the Property to Plaintiff General Auto Service Station, an Illinois corporation that later merged with and into General Auto Service

Station, LLC ("General Auto"). General Auto is the beneficial owner of the Land Trust. Plaintiff F.A.Y. is an Illinois corporation that acts as an agent for General Auto. (UF Pars.2-6.) [1]

Prior to Heerey's death in February 1999, he wholly owned both General Auto and F.A.Y. The two entities are now wholly owned by the Estate of Bernard A. Heerey. Heerey's estate is still in probate and attorney Nathaniel Grey, a partner in the law firm representing Plaintiffs in this case, is serving as executor. Heerey also designated Grey as the trustee of a charitable trust holding, with some exceptions not relevant here, the assets of Heerey's estate. Grey is the current President and Manager of General Auto. (Id. Pars. 7-10.)

From 1959 until Heerey's death, Grey actively represented Heerey in legal matters and was very familiar with Heerey's commercial real estate business. Tr. 52-53.) Grey testified that Heerey essentially treated Grey's office as his own, and that Grey's office manager, Lillian Licheniak, performed secretarial and bookkeeping services for Heerey. In fact, when Grey wanted to give Heerey a copy of a document or letter, Lillian would place it in a pile for Heerey to read when he came to the office. Grey utilized this method of communication "with all letters involving him [Heerey] and all memos," and Grey believes that Heerey read everything Grey set aside for him. (Tr. 54-55.) In addition, Grey personally spoke with Heerey on a regular basis and kept him informed about "[e]verything involving his [Heerey's] work, his matters," including his properties. (Tr. 55.)

B. The Wall Sign

Heerey first had a sign painted on the south exterior wall of the Property (the "Wall Sign") in 1962. It is undisputed that he did not seek or obtain a permit from the City prior to having the Wall Sign painted. The parties disagree as to whether such a permit was required at that time pursuant to section 8.9(5) of the Chicago Zoning Ordinance or Chapter 86.1 of the Chicago Electrical Code, discussed in detail below. (See 1962 Zoning Ordinance § 8.9(5); Chicago Elec. Code § 86.1-4(a) (1962); Chicago Building Code § 51-2 (1962).) At some point between 1962 and 1969, Heerey hired a company called Buck Electric to install lights near the roof line of the Property to illuminate the Wall Sign. (Id. Pars. 11-13.) Plaintiffs believe that Heerey obtained a permit for the lights as required by Chapter 86.1 of the Electrical Code, but the City denies such a claim and no permit was introduced at trial. (Chicago Elec. Code § 86.1-4(a) (1962).} During the 1960s and 1970s, the Wall Sign consisted of two smaller signs. By 1979, however, the Wall Sign was expanded to its current size - approximately 26 feet high and 59 feet wide - and has been in place, at that size, ever since. (Id. Pars. 14, 18, 22.)

The parties agree that the Wall Sign has at all relevant times been an "advertising sign" as that term is defined in the Chicago Zoning Ordinance (the "Zoning Ordinance"), and has been located in a B4-5 zoning district.[2] The Wall Sign has always been within 75 feet of a residence zoning district, but has never been within 75 feet of any residential building located in a residence zoning district. (Id. Pars. 15, 16, 19.)

C. Leasing History

In 1979, Heerey leased the surface of the south exterior wall of the Property (the "Wall Space") to outdoor advertising company Foster and Kleiser, which expanded the Wall Sign to its current size a few months later. Foster and Kleiser stopped leasing the Wall Space in early 1985,[3] and on March 20, 1985, Heerey entered into a new lease for the space with Outdoor Media, Inc. (Id. Pars. 22, 23; http://www.clearchanneloutdoor.com/corp/history/default.asp.)

Shortly thereafter, Whiteco Industries, Inc. ("Whiteco")[4] purchased Outdoor Media and assumed its lease with Heerey. Between 1985 and 1997, Whiteco and Heerey entered into a number of successive leases for the Wall Space. Some time after they entered the last of their lease agreements, Chancellor Media Corporation ("Chancellor") purchased Whiteco and assumed its lease with Heerey. (Id. Pars. 24, 25.)

In 1998, Heerey assigned his interest in the Wall Space lease with Whiteco to F.A.Y. In August 1999, F.A.Y. leased the Wall Space to Chancellor, then doing business as "Chancellor Media Whiteco Outdoor Corporation." The following month Lamar Advertising Company purchased Chancellor and assumed its August 1999 lease with F.A.Y. Lamar is the current lessee of the Wall Space. (Id. Pars. 26-29.)

D. The Violation Notices

1. The 1984 Violation Notice

Prior to 1990, section 8.9(7) of the Zoning Ordinance provided that "[n]o advertising sign shall be permitted within 75 feet of any property in a Residence District."

(1962 and 1976 Zoning Ordinances § 8.9(5).) On September 3, 1986, while this pre-1990 version of the Zoning Ordinance was in effect, the City issued a Notice of Violation far the Wall Sign to Heerey's property management company, Storich & Company. This 1986 Violation Notice stated that the Wall Sign was installed without a permit in violation of "Chapter 88.1" of the Chicago Electrical Code dealing with "Electric Signs and Signboards." (UF Pars. 30, 31; DX 1.) On September 6, 1986, Nathaniel Grey forwarded the Violation Notice to Jeffrey Berg of Whiteco, the lessee of the Wall Space at that time. (Letter from N. Grey to J. Berg of 9/10/86, DX 1.) Sometime thereafter, Grey received a copy of a hearing notice issued by the City's Electrical Compliance Officer. Grey wrote in the margin of the notice, "Whiteco is supposed to be handling." (Tr. 54-65.)

Whiteco did in fact retain attorney Thomas T. Murphy to handle the Violation Notice, and on April 7, 1987, Berg advised Grey of that fact. (Letter from J. Berg to N. Grey of 4/7/87 DX 6.) Two days later, on April 9, 1987, Grey sent Berg a letter stating that "I don't quite understand the 75-foot distance requirement from property in a residential district," and noting that there was no improved property within 75 feet of the sign, "just a vacant lot." (Letter from N. Grey to J. Berg of 4/9/87, DX 7.) Regardless, Grey testified that he spoke with Heerey about the Violation Notice and kept him informed of the situation. (Tr. 51-63.) For reasons not explained in the record, the City did not ultimately pursue this Violation Notice, nor did it ask that the sign be removed. (Pl. Br. Par. 32.)[5]

2. The 1994 Violation Notice

In 1990, the City amended section 8.9(7) of the Zoning Ordinance to state that "[n]o advertising sign having a face which exceeds 100 square feet shall be permitted within 250 feet of a Residence District. No advertising sign shall be permitted within 75 feet of a Residence District." (1990 Zoning Ordinance § 8.9(7).) The parties agree that as of 1990, the Wall Sign did not comply with section 8.9(7) because it is an advertising sign which exceeds 100 square feet and is located within 250 feet of a Residence District Plaintiffs argue, however, that the City should allow the nonconforming Wall Sign to remain in place indefinitely pursuant to the Zoning Ordinance's "grandfather clause," which at all relevant times provided that:

> Any sign that does not conform to Section[] . . . 8.9(7) . . . of this chapter, as amended by this ordinance, and that was lawfully erected pursuant to a permit lawfully issued prior to the effective date of this section, may remain in use as a legal non-conforming sign.

(Pl. Br. Par. 35; 1994 Zoning Ordinance § 6.7-1(a).) In Plaintiffs' view, the Wall Sign qualifies as a legal non-conforming use because it was never located within 75 feet of "any property„ in a Residence District as contemplated by the pre-1990 version of section 8.9(7). Specifically, the Wall Sign is positioned on a building that stands adjacent to a parking lot and, thus, was never within 75 feet of any residential building located within the Residence District. The City insists that Plaintiffs' definition is overly narrow and argues that the parking lot itself constitutes "property" in a Residence District sufficient to trigger the 75-foot restriction.

In any event, it is undisputed that on September 29, 1994, the City issued Heerey a Notification of Violation of the Zoning Ordinance. The Violation Notice stated that the Wall Sign violated section 8.9(7) of the Zoning Ordinance because it exceeds 100 square feet and is located within 250 feet of a Residence District. (UF Pars. 32, 33; PX 1.) On October 5, 1994, Grey sent a letter to Jack Ayers of Whiteco, which remained the lessee of the Wall Space at that time, enclosing a copy of the Violation Notice and directing Whiteco to "[p]lease handle it." Grey copied Heerey on that letter. (Letter from N. Grey to J. Ayers of 10/5/94, DX 10.) In response to the letter, Whiteco submitted a sign permit application to the City on December 20, 1994 (the "1994 Application"). Id. Pars. 34, 35.) On January 12, 1995, William Merritt, an employee of the City's Zoning Department, approved the application as a "legal non-conforming" use and stamped it as "conforms to zoning." (Id.Par. 36; PX 2; Tr. 83-84.) According to Merritt, however, his approval did not formally render the Wall Sign valid under the Zoning Ordinance. Instead, Merritt testified that once an application is marked legal, non-conforming, "[t]he normal process i that it is given to the [B]uilding [Department's] electrical section for their review." Tr. 86.)

Consistent with this additional review process, Whiteco submitted the 1994 Application for further processing by the City on January 31, 1995.[6] On April 12, 1995, Whiteco wrote to Burton Natarus, the City Alderman far the ward in which the Property is located, requesting a City Council order for a sign permit for the Wall Sign.[7] (UF Par. 37.) Also on April 12, 1995, Whiteco Real Estate Manager William P. Schmelter wrote a letter to Dan Allen of the City's Electrical

Inspections Section enclosing a Sign Permit Application. (Letter from W. Schmelter to D. Allen of 4/12/95, DX 11 .) One week later on April 19, 1995, the City's Department of Buildings issued a Plan Correction Sheet - a document that, according to Thomas P. Smith, the City's Acting Zoning Administrator, "instruct[s] applicants as to problems or issues with their applications, things that generally need to be corrected" (Tr. 133) - stating that the application for the 1127 North State Street property required a copy of a City Council order approving the Wall Sign.[8] (Plan Correction Sheet of 4/19/95, DX 12.)

It is undisputed that Whiteco never obtained such a City Council order and that the City never issued a permit for the Wall Sign in response to the 1994 Application. (UF Pars. 38, 39.) There is no evidence, however, that the City formally denied the 1994 Application.

3. The 1997 Violation Notice

Nothing further happened with respect to the Wall Sign until August 22, 1997 when the City issued a Notice of Violation stating: "Obtain permit for outdoor flat building sign installed without permit. (14-40-040)." (UF Par. 40;1997 Notice of Violation, PX 3.) Section 14-40-040 of the Municipal Code (now Section 13-20-550 of the Municipal Code) provides that

> It shall be unlawful to begin the erection, alteration or enlargement of any sign, signboard or structure covered by the provisions of this chapter of the code unless a permit therefor shall have first been obtained from the department of

inspectional services.

(Municipal Code § 14-40-040.) On September 15, 1997, Grey sent William Schmelter of Whiteco a letter, copied to Heerey, enclosing a copy of the 1997 Violation Notice and asking Schmelter to confirm that Whiteco would be handling the matter, (Id.Par. 42; Letter from N. Grey to W. Schmelter of 9/15/97, DX 14.) Shortly thereafter on September 30, 1997, Whiteco appeared as the respondent at an administrative hearing on the Violation Notice. At that hearing,[9] Whiteco" admitted to a "violation of the Chicago Building Code" as charged in the Violation Notice and the hearing officer entered a finding to that effect. Rather than assess a fine against Whiteco, the hearing officer afforded it an "opportunity of mitigation via compliance. Compliance must be evidenced by reinspection and/or other evidence corroborating conditions." (Id, Pars. 43-45; Findings, Decision and Order of 9/30/97, PX 4.)

On April 16, 1998, Whiteco filed a sign permit application with the City, again seeking a permit for the Wall Sign. (Id. Par. 46; 1998 Sign Permit Application, PX 5.) The Zoning Administrator denied the application on April 21, 1998, finding that the Wall Sign violated section 8.9(7) of the Zoning Ordinance. Specifically, the Zoning Administrator noted that the wall Sign "exceeds 100 square feet and falls within 250 feet of a residential zoned district and is not permitted and there is no previous sign permit on file." (Id. 147; Official Denial of Zoning Certification of 4121198, PX 6.) As a result of this finding, the City did not issue a permit in response to the 1998 application. (Id. Par. 48.) On June 5, 1998, Whiteco appealed the decision of the Zoning Administrator to the Zoning Board of Appeals ("ZBA"),

which affirmed the decision on September 14, 1998. (Id. Pars. 49, 50; Zoning Board of Appeals notice of 9/14/98, PX 8.) The ZBA found that "no evidence was presented to indicate that the subject sign is located a minimum 280 feet or more away from a Residence District," and that "under Section 8.9(7) of the zoning ordinance the Board has no authority to permit the said advertising sign at the subject site." (Zoning Board of Appeals notice of 9/14/98, PX 8.)

On October 19, 1998, Whiteco filed a complaint in the Circuit Court of Cook County, Illinois, captioned Whiteco Outdoor Advertising v. City of Chicago Zoning Board of Appeals, et al., No. 98 CH 14280, seeking administrative review of the ZBA decision (the "Administrative Review Action"). (Id. Par. 51.) The next day on October 20, 1998, an Administrative Law Officer with the City's Department of Administrative Hearings imposed a $250 fine and ordered Whiteco to "obtain permit for electrical sign or remove same within 90 days hereof." (Findings, Decisions & Order of 10/20/98, PX 9.) On December 29, 1999, Plaintiffs presented a joint petition to intervene in the Administrative Review Action, which the Circuit Court denied. The City did not appear in court for that proceeding. (UF Par. 52.)

On March 2, 2000, the Circuit Court denied Whiteco's request for relief on its claim for administrative review, and the Illinois Appellate Court affirmed the decision on September 17, 2001. (1d. Pars. 53, 54.) See Whiteco Outdoor Advertising v. City of Chicago Zoning Bd. of Appeals, 324 Ill. App. 3d 1142, 805 N.E.2d 757 (Table) (1st Dist. 2001). Whiteco's Petition for Leave to Appeal to the Illinois Supreme Court was denied on February

6, 2002. (Id. Par. 55.) See Whiteco Outdoor Advertising v. City of Chicago Zoning Bd. of Appeals, 198 Ill. 2d 610, 766 N. E. 2d 245 (Table) (2002).

E. Plaintiffs' Lawsuit

Plaintiffs filed this lawsuit on January 19, 2000 alleging substantive and procedural due process violations and a violation of their right to free speech. This court dismissed the complaint under the Younger abstention doctrine, see General Auto Service Station, 2001 WL 558148, at *2-4, but the Seventh Circuit reversed. See General Auto Service Station, 319 F.3d at 904-07. On April 29, 2003, Plaintiffs filed a First Amended Complaint ("Complaint"), which the court dismissed in part on March 9, 2004. See General Auto Service Station, 2004 WL 442538. Plaintiffs presented two surviving substantive due process claims at a bench trial before this court on December 20, 2044: (1) the City's zoning ordinance is unconstitutional as applied to Plaintiffs' property because it exceeds the police powers of the City and denies due process of law, and (2) the City's zoning ordinance has been unconstitutionally applied in a harsh, oppressive, and arbitrary manner in violation of Plaintiffs' due process rights. 42 U.S.C. § 1983. Having heard and reviewed all the testimonial and documentary evidence in this case, the court is now prepared to rule on these claims.

DISCUSSION

Plaintiffs argue that they have established their substantive due process claims under 42 U.S.C. § 1983 because the Wall Sign is "a vested property right or interest created under state law that the City is

threatening to take away in an arbitrary and irrational manner." (PI, Br. Par. 50.) In Plaintiffs' view, the Wall Sign is entitled to legal, non-conforming status and the City's refusal to recognize such status is unconstitutional. (Id.) (citing Sanderson v. DeKalb County Zoning Bd. of Appeals, 24 Ill. App. 3d 107, 110, 320 N.E.2d 54, 57 (2d Dist. 1974) ("A non-conforming use is a property right which if taken away in an unreasonable manner, or in manner not grounded on public welfare, should be invalid.")) The City denies that the Wall Sign qualifies as a legal, nonconforming sign, and insists that Plaintiffs' § 1983 claims are untimely in any event.

1. Statute of Limitations

The City contends that Plaintiffs' substantive due process claims fail because Plaintiffs did not file this lawsuit within the applicable two-year statute of limitations. See Hoosier Bancorp of Indiana, Inc. v. Rasmussen, 90 F.3d 180,182 (7th Cir.1996) (citing Wilson v. Garcia, 471 U.S. 261, 275, 280 (1985)) ("§ 1983 claims are best characterized as personal injury actions."); Clark v. City of Braidwood, 313 F.3d 764, 766 (7th Cir. 2008) ("The limitations period for § 1983 cases in Illinois is two years.") The City previously raised this issue in its motion to dismiss the First Amended Complaint, arguing that the alleged deprivations of Plaintiffs' vested right to keep the Wall Sign in its current location are based on the Violation Notices issued by the City in 1995 and 1997, and that Plaintiffs' January 2000 lawsuit was untimely, General Auto Service Station, 2004 WL 442636, at *5-6. This court rejected the City's argument at that time because though the City had issued a Violation Notice in 1994

and had failed to grant Whiteco's 1994 permit application, the City nonetheless took no further action to enforce the zoning ordinance at that time. Id. at *9. Thus, the City's issuance of a second Violation Notice in 1997

> arguably did not put Plaintiffs on notice that the City intended to enforce the zoning ordinance in an allegedly unfair manner. In fact, the first time the City actually did enforce a violation notice to Plaintiffs' detriment was either on April 21, 1998, when the Zoning Administrator denied Whiteco's permit application, or on October 20, 1998, when an administrative law officer assessed the $250 fine.

Id. The court also noted that "Plaintiffs did not learn that the City was allegedly wrongfully prohibiting their sign until it denied Whiteco's permit application on April 21,1998." Id.

The City's primary argument on this issue post-trial is that the evidence now establishes that Heerey and his attorney, Grey, both knew that the City "did not issue a permit in response to Whiteco's 1994 sign permit application more than two years before this lawsuit was filed." (City Br., at 4; Tr. 55, 66.)[10] In the City's view, Plaintiffs knew or should have known by September 15, the date Grey forwarded the 1997 Violation Notice to Whiteco, that their rights had been allegedly violated by the City's failure to issue a permit back in 1994, (Id. at 3.) The court agrees.

Plaintiffs claim that the City acted irrationally end arbitrarily by allowing legal, non-conforming

advertising signs to remain in place indefinitely if they were erected "pursuant to a permit lawfully issued," but not if the sign lawfully existed before a permit was required. (Pl. Br. 152.) William Merritt stamped the permit application as a legal, non-conforming use in January 1995, but the City never issued a permit, which ultimately led to the 1997 Violation Notice, stating; "Obtain permit for outdoor flat building sign installed without permit. (14-40-040)." (UF 140; 1997 Notice of Violation, PX 3.) On this record, the court agrees with the City that the 1997 notice should have put Plaintiffs on notice that the City would not allow the purportedly legal, non-conforming Wall Sign to remain in place in the absence of a permit. Though the Zoning Administrator did not officially deny Whiteco's 1998 permit application until April 21,1998, Plaintiffs knew the circumstances that support the claim they are presenting here - i.e., the differential treatment of permitted and non-permitted legal, non-conforming signs -- by September 1997. Plaintiffs did not file this lawsuit until January 2000 and, thus, their § 1983 claims are untimely. In light of the City's extended delays in enforcing the Zoning Ordinance, the court nevertheless addresses the substantive merits of Plaintiffs' claims, as well.

II. Substantive Due Process

[W]hen a plaintiff's substantive due process claim is predicated on the deprivation of a state created property interest, the plaintiff must show (1) that the state actor's conduct was arbitrary and irrational, and (2) that the state actor committed a separate constitutional violation orthat state law remedies are inadequate." Galdikas v. Fagan, 342 F.3d 884, 891 (7th

Cir. 2003). Plaintiffs claim that they have established violations of their substantive due process rights because the City's policy regarding permitted and non-permitted legal, non-conforming signs is arbitrary and irrational, and because the Wall Sign was at all relevant times such a legal, non-conforming sign.

A. Legal, Non-Conforming Use

To prevail on their due process claims, Plaintiffs must first demonstrate that the Wall Sign has legal, non-conforming status under the Zoning Ordinance's grandfather clause. If not, then the Wall Sign, which was not erected pursuant to a permit, violates the ordinance as argued by the City. As explained in the courts earlier opinions, Plaintiffs' situation was, on its face, troubling; it appeared that the City ordinances "grandfathered in" a non-conforming sign so long as it was erected pursuant to a permit, but did not grant that status to signs erected at a time when no permit of any kind was required. As of November 1, 2004, the ordinance has been amended in such a way as to satisfy this concern. Specifically, the City replaced section 6.7-1(a) of the Zoning Ordinance with sections 17-18-0502 and 17-15-0503, which eliminated the requirement for a permit:

> 17-15-0502 Definition
> A nonconforming sign is a sign that was lawfully established, in accordance with zoning and other sign regulations in effect at the time of its establishment but that is no longer allowed by the regulations of this Zoning Ordinance.
>
> 17-15-0503 Continuation of Nonconforming Signs

> Nonconforming signs may remain in use, subject to the regulations of this Section (Section 17-15-0500) and all other applicable requirements of the Municipal Code.

In any event, the court turns to whether the Wall Sign constitutes a legal, non-conforming use under the grandfather clause in effect prior to November 1, 2004.

1. 1962

a. Section 8.9(5)

Plaintiffs claim that the Wall Sign was lawfully erected in 1962 under all relevant provisions of the Zoning Ordinance and Municipal Code. First, Plaintiffs contend that the Wall Sign complied with section 8.9(5) of the Zoning Ordinance in effect at that time because it was never within 75 feet of "any property in" a Residence District. (1962 and 197 Zoning Ordinances § 8.9(5).) In Plaintiffs' view, the term "any property" means a building within a Residence District, and the parties agree that the Wall Sign was never located within 75 feet of any residential building within a Residence District. The City denies that the term "any property" is limited to property improved by a residential building, and argues that the Wall Sign's location within 75 feet of a vacant parking lot that was itself within a Residence District suffices to bring the sign within section 8.9(5) of the Zoning Ordinance.

"A zoning ordinance is in derogation of common-law rights to the use of property and should be strictly construed in favor of the right of the property owner to the unrestricted use of the property." Constantine v.

Village of Glen Ellyn, 217 ILL. App. 3d 4, 15, 575 N.E.2d 1363, 1371 (2d Dist. 1991). At the same time, "[i]t is well established that where the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." United States v. Jones, 372 F.3d 910, 912 (7th Cir. 2004) (quoting Lamie v. United States Trustee, 540 U.S. 526 (2004)). Plaintiffs dispute that the language of section 8.9(5) is plain, noting that Paul Woznicki, the City's former Zoning Administrator, testified that the provision "was a little bit confusing to me in that if it was -- I didn't know where the line would be drawn if you had - did it mean the property line or did it mean the building on a residential property?" (Tr. 92.) According to Woznicki, the 1990 amendment to the Zoning Ordinance eliminating the term "any property in" made it easier to enforce the ordinance by setting "a hard line" that did not require a survey as to where a particular wall was located. (Tr. 92-93.)

The City points to the testimony of Thomas Smith, the City's Acting Zoning Administrator, that "'property' means parcel. It means land. It means real estate, It means - just the common definition of property. It's something you own or possess. It can be your house. It can be your land." (Tr. 114-15, 138.) Smith stated that property includes unimproved property and that the removal of the term "any property" from the Zoning Ordinance in 1990 "made no real change to that code [but] was just an editorial change and just a change of grammar . . . ." (Tr. 138, 143.) In addition, the common dictionary definition of "property contemplates both unproved and unimproved real estate. See, e.g., MERRIAM WEBSTER'S COLLEGIATE

DICTIONARY, at 935 (10th ed.) (defining 1property" as "something owned or possessed; specif: a piece of real estate."); BLACK'S LAW DICTIONARY, at 1216-18 (6th ed.) (noting in part that "[p]roperty is either: real or immovable; or, personal or movable.")

The court agrees that "property" is generally understood to include both a building and a vacant parking lot. Such an interpretation, however, would render the term {"any property" in the pre1990 Zoning Ordinance superfluous; any advertising sign located within 75 feet of a Residence District would by definition be within 75 feet of "any property" - improved or not - within that Residence District. The City Council arguably confirmed that the "any property" language was unnecessary by enacting the 1990 amendments, but the court must give effect to all terms in a statute wherever possible. See, e.g., In re Marriage of Lasky,176 Ill. 2d 75, 79, 678 N.E.2d 1035, 1037 (1997) ("[C]ourts construe statutory provisions in a manner that ... gives full effect to each provision wherever reasonably possible."); People v. Singleton, 103111.2d 339, 345, 469 N.E.2d 200, 203 (1984) ("[S]tatutes should be construed so that language is not rendered meaningless or superfluous.") Under that interpretation, the term "any property" in section 8.9(5) reasonably refers only to improved property. For purposes of this decision, the court will assume that the 1962 Wall Sign did not violate the pre-1990 Zoning Ordinance, In reaching this conclusion, the court finds it significant that the City never enforced the 75-foot restriction as against the Wall Sign for over 20 years, though it was always located within 75 feet of unimproved real estate within a Residence District.

b. Chapter 86.1

The City argues that even if the Wall Sign complied with section 8.9(5) of the Zoning Ordinance in 1962, it nonetheless violated Chapter 86.1 of the Electrical Code (section 13-20-550 of the Municipal Code). That provision made it unlawful to "proceed with the erection, enlargement, alteration or rehang of any illuminated sign or illumination of signboard unless a permit therefor shall have first been obtained from the Commissioner of Buildings." (Chicago Elec. Code § 86.1-4(a) (1962).) The Wall Sign was not illuminated in 1962 but the City notes that section 61-2 of the Building Code provided that "[o]utdoor signs shall comply with applicable provisions of this code and with the special provisions of . . . Chapter 86.1." (Chicago Building Code § 61-2 (1962).) Thomas Smith testified that in his view, a permit was required for all outdoor signs regardless of whether they were illuminated because Chapter 86.1 was found within the Electrical Code. (Tr. 122.)

It appears to the court that Chapter 86.1 applies only to illuminated signs, and as the court noted at trial, it is "a very reasonable understanding that [a person is] complying with 86.1 to the extent [a] sign is not illuminated." (Tr. 126.) The fact that the Chicago Electrical Bureau handled permits relating to non-illuminated signs as "a matter of efficiency in terms of the administration of different code requirements" in no way establishes that non-illuminated signs had to comply with the permit requirement of Chapter 86.1. (Tr. 122 (Smith).) Again, the City's failure to enforce the terms of Chapter 86.1 as against the Wall Sign supports the conclusion that they did not. The court does not find Mr. Smith's contrary testimony on this

issue persuasive and finds that the Wall Sign did not require a permit pursuant to Chapter 86.1 of the Electrical Code when it was first erected in 1962.

2. 1962-1979

Sometime between 1962 and 1969, Heerey arranged for illumination of the Wall Sign. A noted, Chapter 86.1 required that Heerey obtain a permit prior to doing so. Plaintiffs claim that Heerey did obtain a permit, but they offered nothing to support that claim and failed to produce any such permit at trial. Nor is there any evidence that the City has a record of that alleged permit. Thus, on this record the court concludes that the Wall Sign was not lawfully erected as of the date it was illuminated. Furthermore, it is undisputed that at some paint between 1975 and 1979, the Wall Sign, which had previously consisted of two smaller signs, was again united into a single sign. By that time, March 25, 1970 amendments to Chapter 86.1-4 prohibited such an "enlargement" or "alteration" of a sign (and not just an illuminated sign) without a permit, which Heereydid not obtain.

Plaintiffs' only response to the City's argument that the Wall Sign is unlawful under this provision is a facial challenge to its enforcement. Specifically, Plaintiffs assert that "Chapter 85 and its related provisions constituted a prior restraint in violation of the First Amendment to the Constitution." (Pl. Br. Par. 89) (citing Weinberg v. City of Chicago, 310 F. 3d 1029, 1045 (7th Cir. 2002) ("Prior restraints are not per se unconstitutional, however, prior restraints are highly disfavored and presumed invalid.")) Plaintiffs object that the Municipal and Electrical Codes "gave the City

unbridled discretion as to whether or not to issue a permit, as well as provided the City with no specified time period in which the City ... had to act on a sign permit application." (Id.) See also Weirrburg, 810 F.3d at 1045 (noting the two forms of prior restraint - i.e., unbridled discretion that might result in censorship and lack of time limits on licensing procedures). Plaintiffs emphasize the advertising Wall Sign's status a commercial speech, but argue only that the City failed to issue a sign permit in response to Whiteco's application in 1994, or to affirmatively deny the permit request. (Id. Par. 92.)

Plaintiffs have not explained how Chapter 86.1, which at relevant tunes applied to all illuminated signs and not just to advertising signs, constitutes a regulation of commercial speech sufficient to implicate the First Amendment. In addition, Plaintiffs' argument is essentially a restatement of their procedural due process claim, which the court previously dismissed as untimely. See General Auto Service Station, 2004 WL 442636, at *5-8 (procedural due process claim which arose from the City's failure to process a sign permit in 1995 was barred by the two-year statute of limitations). As for the City's discretion in deciding when and whether to issue permits for illuminated signs, Plaintiffs did not qualify for a permit under the relevant zoning laws and, thus, the delay or discretion in issuing such a permit could not have violated Plaintiffs' rights. Plaintiffs have not established that the Wall Sign was a legal, non-conforming use a of the date of illumination or, at the latest, as of the date the illuminated sign was expanded to its current size.

3. 1994-1996

Despite the Wall Sign's apparent disqualification, it is undisputed that, for reasons unexplained in the record, William Merritt of the City's Zoning Department approved the Wall Sign as a legal, non-conforming use in January 1995, and that he stamped Whiteco's 1994 Zoning Application as "conforms to zoning." Pursuant to the Zoning Ordinance's "grandfather clause," however, Whiteco still needed to obtain a permit in order to leave the sign in place. (1990 Zoning Ordinance § 6.7-1(a).) This required a City Council order, which Whiteco did not obtain, so the City refused to issue a permit. Plaintiffs argue that they should not have needed a permit in 1994 because they did not need a permit prior to that date when the Wall Sign was established as a legal, non-conforming use. In Plaintiffs' view, the City treated them differently than other owners of legal, non-conforming signs solely because Plaintiffs' sign did not require a permit when it was erected. For the reasons explained earlier, however, the Wall Sign was not in ac a legal, non-conforming use prior to 1994 because Whiteco never obtained the required permit prior to illuminating it, or prior to expanding it once illuminated. (Chicago Elec. Code § 86,1-4(a) (1962).)

The City has not explained why Merrift reached what appears to be a contrary conclusion in 1995. The court suspects this may have occurred because the 1994 Violation Notice cited only section 8.9(7) of the zoning Ordinance and not Chapter 86.1 of the Electrical Code. (UF Pars. 32, 33; PX 1.) Indeed, the City did not issue a Violation Notice relating to Chapter 86.1 until August 1997. The court believes, however, that Merritt's conclusion was in error despite the City's failure to reference one of the violated Code provisions in its 1994 notice. The Wall Sign was not a legal, non-conforming

use prior to 1994 with respect to Chapter 86.1 of the Electrical Code and, thus, the City's allegedly differential treatment of owners of legal, non-conforming signs depending upon whether they had a permit is not relevant here. It is true that the City failed to pursue the 1994 Violation Notice, and that it later denied a permit for the illuminated Wall Sign in 1998 pursuant to section 8.9(7) of the Zoning Ordinance, a provision for which Plaintiffs were arguably entitled to grandfather status. (Official Denial of Zoning Certification of 4121198, PX 6.) Plaintiffs' lawsuit, however, is based on their objection to the City's requirement that they obtain a permit in the first place, not merely that the permit was denied. That objection, in turn, is premised on the notion that the unpermitted Wall Sign was a legal, non-conforming use. It was not, and Plaintiffs have failed to establish a violation of their substantive due process rights.

B. Rationality of Permit Requirement

Having determined that the Wall Sign did not have legal, non-conforming status once it was illuminated and then enlarged, the court need not consider the rationality of any alleged differential treatment of owners of legal, non-conforming signs depending upon whether the signs were erected with permits.

CONCLUSION

For the reasons stated, judgment is entered in favor of the City of Chicago on Plaintiffs' substantive due process claims.

Footnotes

[1]The parties' Statement of Uncontested Facts is cited as "UF ,"

[2]The parties do not define a B4-5 zoning district or describe its significance. Pursuant to a new Ordinance effective on November 1, 2004, the district in which the Wall Sign is located is now known as a DX-7 zoning district, and the Wall Sign is now defined as an "off-premises" sign. (UF Par. 15.) The parties have not explained the significance of these changes.

[3]The parties do not explain how Foster and Kleiser's relationship with Heerey came to an end.

[4]Sometime prior to August 1997, Whiteco Industries, Inc. became known as Whiteco Outdoor Advertising. (UF Pars. 40, 41.) For purposes of this opinion, the court will refer generally to "Whiteco."

[5]Plaintiffs' Post Trial Brief and Final Argument is cited as "Pl. Br. "

[6]Neither party submitted a copy of the documentation submitted to the City in January 1995 or indicated to whom the documentation was addressed.

[7]Again, the parties did not submit a copy of the letter to Alderman Natarus.

[8]The Plan Correction Sheet is not addressed to anyone in particular and it is not clear who received a copy of it. The court notes, however, that the document was produced during discovery by Lamar Advertising, which in September 1999 purchased Chancellor, then doing business as "Chancellor Media Whiteco Outdoor

Corporation." (Tr. 134-35.) It is thus reasonable to assume that Vvhiteco received a copy of the Plan Correction Sheet sometime prior to September 1999.

[9]The admission line on the Findings, Decision and Order is signed by someone named Cynthia, last name illegible. The parties do not indicate her relationship to Whiteco.

[10]Defendant City of Chicago's Post-Trial Brief is cited as "City Br., at "

No. 00 C 0368

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

GENERAL AUTO SERVICE STATION, an Illinois corporation, F.A.Y. PROPERTIES, INC., an Illinois corporation, and COSMOPOLITAN BANK AND TRUST, SUCCESSOR TO THE COSMOPOLITAN NATIONAL BANK OF CHICAGO, not individually but as trustee under agreement dated December 21, 1994 and known as trust # 27340,
Plaintiffs,

v.

The CITY OF CHICAGO, a municipal corporation, and LAMAR ADVERTISING COMPANY, a Delaware corporation, of itself and d/b/a Lamar Whiteco Outdoor Corporation,
Defendants.

March 9, 2004, Decided
March 10, 2004, Docketed

JUDGES: REBECCA R. PALLMEYER, United States District Judge.

OPINION BY: REBECCA R. PALLMEYER

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiffs General Auto Service Station ("General Auto"), F.A.Y. Properties, Inc., ("F.A.Y.") and Cosmopolitan Bank and Trust, Successor to the Cosmopolitan National Bank of Chicago, brought this suit against Defendants the City of Chicago (the "City") and Lamar Advertising Company ("Lamar") to resolve a dispute regarding a sign painted on an exterior wall of a building located at 1127-33 North State Street in Chicago, Illinois. The City determined that the sign, which has existed in its current location and near its current size for over 40 years, violates an amended zoning ordinance and must be removed. In this lawsuit, Plaintiffs assert that the ordinance is unconstitutional as applied to their property under the First Amendment free speech clause (Count I) and the Fourteenth Amendment due process clause (Counts II, III, and IV). Plaintiffs also allege that the City has effected an unlawful taking of their property (Count V) and seek a writ of mandamus ordering the City to initiate an eminent domain proceeding pursuant to 735 ILCS 5/7-101 (Count VI). In Count VII, Plaintiffs charge Lamar with breach of contract. The City and Lamar have separately moved to dismiss all Counts of Plaintiffs' complaint. For the reasons set forth here, the City's motion is granted in part and denied in part, and Lamar's motion is granted.

BACKGROUND

The facts of this case, including a complete description of the relationships between the various parties, have been fully presented in this court's May 21, 2001 Memorandum Opinion and Order, *see General Auto Service Station v. City of Chicago*, 2001 U.S. Dist. LEXIS 23711, No. 00 C 368, 2001 WL 558148 (N.D. Ill.

May 21, 2001), and in the Seventh Circuit's decision in *General Auto Service Station LLC v. City of Chicago*, 319 F.3d 902 (7th Cir. 2003). This opinion assumes the reader's familiarity with these earlier decisions and will summarize the relevant facts here only briefly.

General Auto owns the building at 1127-33 North State Street where the disputed sign is located. When the sign was first erected in 1962, no permits were required under the then existing zoning ordinance because it was positioned 75 feet from any residential area. (FAC PP6, 16.) [1] [*4] In 1990, the City amended the zoning ordinance to require that such advertising signs be at least 250 feet from a residential area, rendering the sign in violation of the new ordinance. In September 1994, the City issued Whiteco Industries,[2] which held the lease on the wall space throughout the 1990's, a notice that the sign violated the amended ordinance. (*Id.* PP23, 27, 29.) Whiteco applied for a permit, armed with a certification from the Zoning Administrator that the sign constituted a "legal non-conforming use" -- i.e., it was in compliance with the Code despite the fact that it did not conform with the current zoning code, because it conformed with the code in force at the time the sign came into existence. (*Id.* PP30-33.) For reasons that are not explained, the City did not process the application and nothing more happened until August 1997, when the City issued another notice of violation. (*Id.* PP34, 35.) Whiteco again applied for a permit, but this time the Zoning Administrator denied the request on April 21, 1998. Whiteco appealed to the Zoning Board of Appeals ("ZBA"), but on September 14, 1998, the ZBA affirmed. (*Id.* PP39-42.) On October 20, 1998, an administrative law officer assessed a $ 250 fine and

ordered Whiteco to remove the sign within 90 days. (*Id.* Par. 44.)

The day before it received that order, on October 19, 1998, Whiteco filed a complaint with the Circuit Court of Cook County seeking administrative review of the ZBA decision. Plaintiffs jointly moved for leave to intervene in that action but the Circuit Court denied their request. (*Id.* P43.) On March 2, 2000, the Circuit Court also denied Whiteco's claim for relief. That decision was affirmed on appeal. *Whiteco Outdoor Advertising v. City of Chicago Zoning Bd. of Appeals,* No. 98 CH 14280 (Cir. Ct. Cook County Mar. 2, 2000), *aff'd,* No. 1-00-1194 (Ill. App. 1st Dist. Sept. 17, 2001), *leave to appeal denied,* 198 Ill. 2d 610, 766 N.E.2d 245, 262 Ill. Dec. 625 (2002). A few weeks before the Circuit Court issued its opinion, Plaintiffs initiated this lawsuit in federal court alleging substantive and procedural due process violations and a violation of their right to free speech. This court dismissed the complaint under the *Younger* abstention doctrine, *see General Auto Service Station,* 2001 U.S. Dist. LEXIS 23711, 2001 WL 558148, at *2-4, but the Seventh Circuit reversed. *See General Auto Service Station,* 319 F.3d at 904-07.

On April 29, 2003, Plaintiffs filed a First Amended Complaint ("FAC") alleging that (1) the City's zoning ordinance is unconstitutional as applied to their property because it violates their right to freedom of speech (Count I); (2) the City violated their procedural due process rights by failing to process the first sign permit application in 1995 (Count II); (3) the City's zoning ordinance is unconstitutional as applied to their property because it exceeds the police powers of the City and denies due process of law (Count III); (4) the

City's zoning ordinance has been unconstitutionally applied in a harsh, oppressive, and arbitrary manner in violation of their due process rights (Count IV); (5) the City's zoning ordinance is unconstitutional as applied to their property because it constitutes an unlawful taking (Count V); and (6) the City should be ordered to compensate them under the Illinois state Eminent Domain statute, 735 ILCS 5/7-101 (Count VI). Plaintiffs also allege that Defendant Lamar breached its lease agreement to indemnify Plaintiffs for their reasonable attorneys' fees incurred in prosecuting this case (Count VII).

The City of Chicago and Lamar now separately seek dismissal of Plaintiffs' FAC.

DISCUSSION

Defendants have moved to dismiss the FAC for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim under Rule 12(b)(6). The purpose of a motion to dismiss is not to decide the merits of the case; a Rule 12(b)(6) motion tests the sufficiency of the complaint, *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990), and a Rule 12(b)(1) motion tests subject matter jurisdiction. *Long v. Shorebank Development Corp.*, 182 F.3d 548, 554 (7th Cir. 1999). In reviewing a motion to dismiss under either rule, the court takes as true all factual allegations in the plaintiffs' complaint and draws all reasonable inferences in their favor. *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 770 (7th Cir. 2002); *Transit Express, Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001). A motion to dismiss under Rule 12(b)(6) will be granted only "if it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which entitles him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

A. The City's Motion to Dismiss

The City claims that dismissal is proper because (1) the taking and eminent domain claims are not ripe for review; (2) the zoning ordinance is a reasonable, content-neutral restriction on speech; and (3) the due process claims are not ripe for review, are time-barred, or simply do not state claims for relief. The court addresses each argument in turn.

1. Takings and Eminent Domain Claims

Plaintiffs concede that their unlawful takings claim is premature and not properly before this court because their sign is still in place and "no monetary damage has been suffered by Plaintiffs relating to loss of income from the leasing of space for the Painted Sign." (Pl. Response, at 5; City Mem., at 2-4.)[3] Plaintiffs also concede that their eminent domain claim is premature because their right to relief is conditioned upon possible future events; namely, a finding that the zoning ordinance is constitutional and an order directing Plaintiffs to remove the sign. (*Id.*) The City's motion to dismiss Counts V and VI of the FAC is therefore granted, and those counts are dismissed without prejudice.

2. First Amendment Claim

Plaintiffs allege that the zoning ordinance is unconstitutional as applied to their sign because it

allows advertising signs to remain as legal, non-conforming signs if they predated the 1990 amendments and were erected pursuant to a valid permit, but not if the signs predated the 1990 amendments and were erected without a permit, even if no permit was required at the time. A statute that regulates the time, place, and manner of expression will not offend the First Amendment if it (1) is content-neutral, (2) is narrowly tailored to serve a significant governmental interest, and (3) allows for ample alternative channels for the expression. *Hodgkins ex rel. Hodgkins v. Peterson,* 355 F.3d 1048, 1059 (7th Cir. 2004). If an ordinance is content-neutral and has an incidental impact on expression, courts apply the standard set forth in *United States v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), under which the ordinance will be upheld if: (1) the regulation is within the constitutional power of the government; (2) the regulation furthers a substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the restriction is no greater than is essential to the furtherance of the governmental interest. *Id.* at 376-77. *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-301, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000) (plurality opinion); *Hodgkins ex rel. Hodgkins,* 355 F.3d at 1059.

The City claims that its zoning ordinance is content-neutral because it regulates all large, lighted signs, including advertising signs, without reference to the content of the advertisement. As a content-neutral regulation on speech, the City argues, the ordinance is valid as long as it meets the *O'Brien* standards. (City Mem., at 9-10) (citing *City of Erie,* 529 U.S. at 296-301). Plaintiffs disagree, arguing that the ordinance

regulates commercial speech by restricting the location of advertising signs:

> No advertising sign having a face which exceeds 100 square feet shall be permitted within 250 feet of a Residence District. No advertising sign shall be permitted within 75 feet of a Residence District.

Code § 17-32-580(7) ("Section 8.9(7)"). In Plaintiffs' view, the court must therefore analyze the ordinance under the standard set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980), which requires a showing that: (1) the speech concerns lawful activity and is not misleading; (2) the governmental interest is substantial; (3) the regulation directly advances the governmental interest; and (4) the regulation is not more extensive than necessary to advance that interest. *Id.* at 566. (Pl. Response, at 6-7.)

The City notes, in response, that Plaintiffs' First Amendment claim turns not only on Section 8.9(7) of the ordinance, but also on Section 14-40-040, which requires a permit for signs covered by the ordinance; and on Section 6.7-1(a), which affords legal, non-conforming status to certain preexisting signs erected pursuant to a permit. [4] Those sections apply not just to advertising signs, but to other types of signs as well. (City Reply, at 5) (noting that Section 6.7-1(a) applies to Section 8.9(5), which addresses signs, other than business signs, along major routes.) [5] *See also* Section 3.2 (defining "Sign" as "a name, identification, description, display, or illustration which is affixed to . . . a building, structure, or piece of land and which directs

attention to an object, product, place, activity, person, institution, organization, or business"). The City also contends that advertising signs are regulated differently not because they [*13] contain commercial speech but because they are located off-premises from the business advertised. (*Id.* at 6.) In any event, the City maintains, dismissal is appropriate because "the basis for the claimed irrationality has nothing to do with the content of the Sign, but rather with the City's failure to process a permit so that the new Ordinance (which is otherwise unchallenged) would not apply to the Sign." (City Surresponse, at 6.)[6]

The court agrees. As noted, Plaintiffs claim that the zoning ordinance violates the First Amendment because it allows advertising signs that pre-dated the 1990 amendments and which now violate those amendments to remain only if the signs were initially erected pursuant to a permit, regardless of whether such a permit was even required at the time the sign was erected. Plaintiffs' sign happens to be an advertising sign, but the provisions they really challenge here -- the legal, non-conforming use and permit provisions, by which the City only "grandfathers in" those signs that were issued pursuant to a permit -- apply to all signs, not just advertising signs. Plaintiffs nowhere argue that the size and distance restrictions on advertising signs found in Section 8.9(7) will not pass constitutional muster. Thus, the court agrees with the City that Plaintiffs' challenge is not aimed at the ordinance's regulation of commercial speech.

Moreover, as the court noted in its earlier decision, "Plaintiffs' First Amendment argument is nothing more than a restatement of its arguments that the City's

refusal to 'grandfather' Plaintiffs' sign deprives it of due process." *General Auto Service Station,* 2001 U.S. Dist. LEXIS 23711, 2001 WL 558148, at *6. Plaintiffs cannot convert what is essentially a due process claim into one under the First Amendment merely by noting that theirs is an advertising sign. Plaintiffs have not effectively alleged a First Amendment challenge to the zoning ordinance, and the City's motion to dismiss Count I is granted.

3. Due Process Claims

The City argues that Plaintiffs' procedural due process claim (Count II) and substantive due process claims (Counts III and IV) must all be dismissed because they are not ripe for a decision, they are barred by the applicable statute of limitations, and they fail to state claims in any event.

a. Ripeness

In its opening memorandum, the City claimed that Plaintiffs were attempting to bring "what are essentially takings claims labeled as federal substantive due process or procedural due process claims." (City Mem., at 5) (citing *Forseth v. Village of Sussex,* 199 F.3d 363, 369-70 (7th Cir. 2000)). Relying on this theory, the City argued that Plaintiffs had failed to exhaust their state court remedies as required by *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194-96, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). (City Mem., at 5.) As noted, Plaintiffs concede that their takings and eminent domain claims are premature and not properly before this court. (Pl. Response, at 5-6.) In light of this concession, Plaintiffs'

due process claims cannot fairly be characterized as takings claims. The City has not otherwise challenged the ripeness of Plaintiffs' due process claims and, in fact, argues that those claims are untimely. The ripeness objection is overruled.

b. Statute of Limitations

The City next argues that Plaintiffs' due process claims are barred by the applicable statute of limitations. The Supreme Court has directed that the proper statute of limitations for § 1983 claims is the personal injury statute of limitations of the state in which the alleged injury arose. *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 182 (7th Cir. 1996) (citing *Wilson v. Garcia*, 471 U.S. 261, 275, 280, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985)) ("§ 1983 claims are best characterized as personal injury actions"). "The limitations period for § 1983 cases in Illinois is two years." *Clark v. City of Braidwood*, 318 F.3d 764, 766 (7th Cir. 2003).

The City claims that Count II, which alleges a procedural due process violation based on the City's failure to process Plaintiffs' 1995 permit application, is time-barred because Plaintiffs "became aware of the non-issuance of the permit no later than August 1997, when the second Notice of Violation was issued," but waited more than two years, until January 19, 2000, to file a complaint. (City Mem., at 8.) According to the City, Counts III and IV are similarly untimely because they, too, "are clearly based on the 1995 and 1997 violations." (*Id.*) Count III alleges that the zoning ordinance violates Plaintiffs' due process rights by "prohibiting the Current Sign as it exists." (FAC P48.)

Count IV alleges that the zoning ordinance violates Plaintiffs' due process rights based on the City's retroactive application of the amended permit requirement and the restrictions on the placement of advertising signs. (*Id.* P49.) In the City's view,

> it is only because the City failed to issue the sign permit applied for by Whiteco in 1995 that plaintiffs can claim that the City violated their "vested property rights" by "retroactively" applying the Ordinances. Similarly, it is only because the City issued the second violation notice in 1997 that plaintiffs can claim that the City is "prohibiting" the Sign; no subsequent enforcement action by the City is alleged.

(City Mem., at 8.)

Plaintiffs first respond that their due process claims seek equitable and declaratory relief and, thus, are not subject to the statute of limitations. [7] (Pl. Response, at 12-13.) In support of this argument, Plaintiffs cite *Lavey v. City of Two Rivers*, 994 F. Supp. 1019 (E.D. Wis. 1998). The plaintiffs in *Lavey* brought a facial challenge to a zoning ordinance under the First Amendment, and the city sought summary judgment on statute of limitations grounds. The city relied on *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991) [*19] for the proposition that the § 1983 claims were time-barred, but the court found that case, which ad dressed a claim for an unconstitutional taking, inapposite where the plaintiffs sought declaratory and injunctive relief. 994 F. Supp. at 1023. The court also found it significant that the *National Advertising* court considered it "doubtful that an

ordinance facially offensive to the First Amendment [could] be insulated from challenge by a statutory limitations period." *Id.* (quoting *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991)). *See also Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 441 (M.D.N.C. 1999) (in light of *National Advertising*, court declined to apply § 1983 statute of limitations to facial First Amendment challenge to zoning ordinance).

In this case, Plaintiffs do not raise any facial challenges to the zoning ordinance. They correctly note, however, that their sign "remains in place to this day," leaving them "no current legal right to claim damages." (Pl. Surreply, at 5 n.1.) [8] The *Lavey* court assumed that the § 1983 statute of limitations defense was unavailable for claims seeking equitable, as opposed to legal, relief, but did not elaborate on that assumption. Plaintiffs suggest that the rationale is found in *Union Carbide Corp. v. State Board of Tax Comm'rs*, 992 F.2d 119 (7th Cir. 1993), which, they claim, establishes that "statutes of limitation that bar legal actions do not bar equitable actions." (Pl. Response, at 13.) Unlike § 1983, which provides for both legal and equitable relief, however, the Railroad Revitalization and Regulatory Reform Act of 1976 at issue in *Union Carbide* only contemplated equitable relief. 992 F.2d at 123. *Compare Bosco v. Chicago Transit Authority*, 164 F. Supp. 2d 1040, 1050 (N.D. Ill. 2001) ("municipalities and other local governments may be sued for damages, as well as declaratory and injunctive relief under a Section 1983 theory").

The City's reliance on *Nemkov v. O'Hare Chicago Corp.*, 592 F.2d 351 (7th Cir. 1979) to establish that the

statute of limitations applies to claims for equitable relief is equally misplaced. *Nemkov* held that where shareholders could have sought relief at law but chose not to do so, the statute of limitations applied to the equitable claims they did pursue. *Id.* at 355 ("equitable jurisdiction is concurrent even though plaintiff chooses to forego damages and to seek only equitable relief"). *See also Cannon v. University of Health Sciences/The Chicago Medical Sch.*, 710 F.2d 351, 358 (7th Cir. 1983) (quoting *Cope v. Anderson*, 331 U.S. 461, 464, 91 L. Ed. 1602, 67 S. Ct. 1340 (1947)) ("equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy").

Nevertheless, the Supreme Court has determined that § 1983 claims are best characterized as personal injury actions for statute of limitations purposes, even where such claims contemplate both legal and equitable relief. *Wilson*, 471 U.S. at 278, 280 (§ 1983 derives from the Fourteenth Amendment, which recognizes that no person shall be deprived of life, liberty, or property "without due process"; "[a] violation of that command is an injury to the individual rights of the person"). Plaintiffs have cited no cases that have found a statute of limitations inapplicable where, as here, a plaintiff sought injunctive relief under § 1983 based on an as-applied due process challenge to a zoning ordinance, nor is this court aware of any. Absent such authority, the court proceeds with an analysis of whether Plaintiffs' claims were filed within the limitations period.

Plaintiffs insist that their due process claims are timely because they were filed "within two years of the City's final administrative rulings, the true benchmark for calculating any applicable limitations period." (Pl.

Surreply, at 5.) As Plaintiffs see it, the final administrative ruling on the 1995 sign permit application was entered on September 14, 1998 when the Zoning Board of Appeals affirmed the decision to deny Plaintiffs a permit. The final administrative ruling on the 1997 zoning ordinance violation notice occurred on October 20, 1998, when a City administrative law officer entered a final judgment, assessed a $ 250 fine against Whiteco, and ordered the company to remove the sign within 90 days. (*Id.* at 5-6; FAC Par. 44.) Plaintiffs filed their complaint on January 19, 2000 which, they argue, is well within the two year statute of limitations period on both claims. (*Id.*)

Plaintiffs' only support for this theory is *Draghi v. County of Cook*, 985 F. Supp. 747, 749 (N.D. Ill. 1997), in which a doctor formerly employed at Cook County Hospital filed a § 1983 action challenging his suspension and ultimate discharge. *Id.* at 748. The parties disputed, in part, whether the final adverse decision of the hospital board occurred when the board met and decided to uphold the discharge on April 5, 1995, or six days later, when the board issued its notification of that decision. *Id.* at 749. The notification specifically stated that the termination was "effective immediately," and the court interpreted that language to apply to the date of the notification, not the earlier date when the hospital board voted on the issue. *Id.* at 750. The doctor's lawsuit, filed on April 11, 1997, exactly two years after the April 11, 1995 notification date, was, therefore, timely. *Id.*

Contrary to Plaintiffs' suggestion, the *Draghi* case provides little guidance in resolving the issue currently before this court. It is not clear that the administrative

review procedures of a county hospital regarding employee terminations are comparable to those of a city zoning commission assessing permit applications. Nor do the parties in this case dispute the interpretation of a zoning violation notice. In addition, *Draghi* addressed only a substantive, and not a procedural, due process claim, whereas this case involves both. In any event, a limitations period generally begins "when facts exist which authorize one party to maintain an action against another." *Bank of Ravenswood v. City of Chicago*, 307 Ill. App. 3d 161, 167, 717 N.E.2d 478, 483, 240 Ill. Dec. 385 (1st Dist. 1999). Thus, "a plaintiff's cause of action accrues at the time its interest is invaded; the mere fact that the extent of its damages is not immediately ascertainable does not postpone the accrual of a plaintiff's claim." *Id.*

The procedural due process claim in Count II of Plaintiffs' FAC arises from the City's failure to process a sign permit in 1995. Plaintiffs certainly knew by August 1997, when Whiteco received another notice of violation, that the City had not processed that permit application. Plaintiffs suggest that the limitations period was tolled during the pendency of the City's enforcement action against Whiteco, which arose from the denial of Whiteco's permit request in 1997. The court disagrees. What happened before the Zoning Board of Appeals with respect to the 1997 permit application, and during the subsequent enforcement action against Whiteco, did not affect Plaintiffs' right to challenge the procedural failure to process the earlier permit request in 1995. Nor can Plaintiffs characterize the failure to process the 1995 permit as a continuing violation; a continuing violation is occasioned by continuing unlawful *acts and conduct*, not by continual

Ill effects from an initial violation. *Hyon Waste Mgmt. Servs., Inc. v. City of Chicago*, 214 Ill. App. 3d 757, 574 N.E.2d 129, 132, 158 Ill. Dec. 335 (1st Dist. 1991). Thus, Plaintiffs' procedural due process claim is barred by the statute of limitations and is dismissed.

The substantive due process claims challenge the zoning ordinance because it prohibits Plaintiffs' sign in its current location and infringes vested property and contractual rights. As noted, Plaintiffs argue that there were no final adverse rulings on these claims until (1) September 14, 1998, when the Zoning Board of Appeals denied the 1997 permit request; and (2) October 20, 1998 when an administrative law officer entered final judgment on the ZBA's decision, assessed a $ 250 fine, and ordered Whiteco to remove the sign within 90 days. The City insists that both claims are inextricably tied to incidents in 1995 and 1997; the City only violated Plaintiffs' "vested property rights" by failing to issue the sign permit in 1995; the City is only prohibiting Plaintiffs' sign right now by virtue of the 1997 violation notice.

The court is less certain. As this court understands this claim, Plaintiffs assert a vested right to keep their sign in its current location not just because the City failed to process the 1995 permit application, but also because they should not need a permit at all given that the sign was lawfully erected without a permit before the amendments went into effect. The City raised the violation issue with Whiteco twice -- once in 1994, and again in August 1997. In response to the 1994 violation notice, Whiteco applied for a permit; the City never granted one, but it also never took further action to enforce the zoning ordinance. As a result, the second

violation notice in 1997 arguably did not put Plaintiffs on notice that the City intended to enforce the zoning ordinance in an allegedly unfair manner. In fact, the first time the City actually did enforce a violation notice to Plaintiffs' detriment was either on April 21, 1998, when the Zoning Administrator denied Whiteco's permit application, or on October 20, 1998, when an administrative law officer assessed the $ 250 fine. Similarly, Plaintiffs did not learn that the City was allegedly wrongfully prohibiting their sign until it denied Whiteco's permit application on April 21, 1998. (FAC Par. 48) (citing permit provision of Section 14-40-040.) As noted, Plaintiffs filed their substantive due process claims on January 19, 2000, which is less than two years after April 21, 1998. The City's motion to dismiss Counts III and IV pursuant to the statute of limitations is denied.

c. Failure to State a Claim

The City's final objection to Plaintiffs' FAC is that it fails to state substantive due process claims. "When a plaintiff's substantive due process claim is predicated on the deprivation of a state created property interest, the plaintiff must show (1) that the state actor's conduct was arbitrary and irrational, and (2) that the state actor committed a separate constitutional violation *or* that state law remedies are inadequate." *Galdikas v. Fagan*, 342 F.3d 684, 691 (7th Cir. 2003). The City claims that Plaintiffs cannot satisfy the second requirement -- i.e., that the City committed a separate constitutional violation or, in the alternative, that Plaintiffs' state law remedies are inadequate. (City Mem., at 6.)

Plaintiffs first argue that they have alleged a separate

constitutional violation under the First Amendment. (Pl. Response, at 10.) The court has already determined, however, that Plaintiffs' First Amendment challenge to the City's content-neutral zoning ordinance, which is really just a restatement of their due process claims, cannot withstand the City's motion to dismiss. Plaintiffs also argue that their state law remedies are inadequate because "an exception to any exhaustion requirement would apply 'based on the futility of seeking state court relief.'" (*Id.* at 11) (quoting *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 456 (7th Cir. 2002)). The *Daniels* case involved a takings claim, not a substantive due process claim, and it addressed the exhaustion requirement of *Williamson County*, not the requirement that state law remedies be inadequate. As noted earlier, both parties concede that Plaintiffs' takings claims are not properly before this court and that *Williamson County* does not apply.

Plaintiffs insist that the City is nonetheless estopped to argue that Plaintiffs' state law remedies are adequate because Plaintiffs were rebuffed when they tried to intervene in Whiteco's state court lawsuit. (Pl. Surreply, at 5.) Plaintiffs rely on language in the Seventh Circuit's decision in this case regarding the appropriateness of abstention. In determining that it was improper for the court to abstain from hearing this case, the Seventh Circuit stated that General Auto did not have an adequate opportunity to present its constitutional arguments in state court because "no state forum was available." *General Auto Service Station*, 319 F.3d at 905. As the court explained:

> General Auto *tried* to litigate in state court -- and was rebuffed. It sought to intervene in Whiteco's suit, a sensible step that would have enabled the state judiciary to resolve all theories affecting all parties at one go. Yet Chicago opposed its motion to intervene, and the state court denied the motion.
>
> * * * *
>
> Having persuaded the state court that General Auto was not entitled to adjudication of its constitutional theories, Chicago is estopped to argue in federal court that General Auto could have litigated in state court if only it had tried harder.

Id. (emphasis in original).

The City disputes that it opposed Plaintiffs' motion to intervene, arguing that the City's appellate attorney misspoke on that point during oral argument. (City Reply, at 3.) Regardless, the City contends that when the Seventh Circuit said that General Auto had no available state forum, the court meant General Auto could not mount any constitutional defenses in an enforcement proceeding because it had not been fined by the City, and because it was not allowed to intervene in Whiteco's case. (City Surresponse, at 2 n.3.) *See also General Auto Service Station*, 319 F.3d at 905. The City notes that in denying Plaintiffs' motion for leave to intervene in Whiteco's enforcement proceeding, the state court remarked that the decision "in no way reflects upon your ability to consolidate any other pending declaratory action. But you're not a party to

the administrative review." (City Reply, at 3) (quoting Report of Proceedings on Dec. 29, 1999 in Case No. 98 CH 14280, at 5.) In the City's view, Plaintiffs can challenge the City's application of the zoning ordinance to their sign "on state-law due process grounds." (*Id.*, at 10; FAC Pars. 46-49.)

State law remedies are not inadequate where a plaintiff had an opportunity to challenge a zoning decision in state court. In *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699 (7th Cir. 1998), for example, the plaintiff claimed that the town violated its substantive due process rights by denying a building permit. *Id.* at 704. The court dismissed the claim, finding that the plaintiff could not allege its state law remedies were inadequate: "the state court addressed directly the gravamen of Centres' complaint and held that the defendants' decision was neither arbitrary nor unreasonable." *Id.* In this case, the Seventh Circuit has made it clear that Plaintiffs did not have an opportunity to object to the permit denial or to raise their constitutional defenses in Whiteco's state court proceeding. *See General Auto Service Station*, 319 F.3d at 905. Thus, Plaintiffs' state law remedies were not adequate in that regard.

The only other state law remedies identified by the City are Plaintiffs' challenges under the Illinois Constitution. The City has not, however, cited any case in which a court found adequate state law remedies in the state constitution, or required a plaintiff to pursue state substantive constitutional claims before redressing federal ones. *Compare Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003) ("far from alleging the inadequacy of state-law remedies, Lee has

asserted pendant state-law claims for bailment, trespass, and wrongful conversion"). Plaintiffs have sufficiently alleged that their state law remedies are inadequate and the City's motion to dismiss the substantive due process claims is denied.

B. Lamar's Motion to Dismiss

Chancellor Media Corporation ("Chancellor") purchased Whiteco Industries sometime between 1997 and August 1999. In August 1999, Plaintiff F.A.Y. Properties leased the wall space at 1127-33 North State Street to Chancellor, doing business as "Chancellor Media Whiteco Outdoor Corporation ("Whiteco"). (FAC Par. 24.) Defendant Lamar is the successor in interest to Whiteco. Plaintiffs have sued Lamar for indemnification of the attorneys' fees Plaintiffs have incurred in prosecuting this case, relying on an indemnification provision in the parties' Sign Location Lease (the "Lease"). In its motion to dismiss, Lamar contends that the court lacks subject matter jurisdiction over Plaintiffs' state law breach of contract claim; this litigation does not arise out of the lease agreement as required to state a breach of contract claim; and Lamar is not a proper nominal defendant.

The parties agree that Plaintiffs can only maintain their breach of contract claim in this federal case if the court has supplemental jurisdiction over the claim. (Lamar Mem., at 4; Pl. Response, at 1.) A federal court has jurisdiction to hear "all claims sufficiently related to the claim on which its original jurisdiction is based to be part of the same case or controversy within the meaning of Article III of the Constitution." *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181 (7th

Cir. 1993). *See also* 28 U.S.C. § 1367. Claims are sufficiently related if they "'derive from a common nucleus of operative fact,' such that 'the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case.'" *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164-65, 139 L. Ed. 2d 525, 118 S. Ct. 523 (1997) (quoting *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)).

Lamar argues that the constitutional claims against the City of Chicago and the breach of contract claim against Lamar have no relation to each other. The constitutional claims involve amendments to the City's zoning ordinance and the manner in which they were applied to Plaintiffs' advertising sign. The breach of contract claim relates to the negotiation and execution of the Lease and whether Lamar has an obligation to indemnify Plaintiffs under its terms. (Lamar Mem., at 5.) Plaintiffs respond that the claims are related because "the only reason such prosecution became necessary was because of the Lease for the Painted Sign and Whiteco's (Lamar's) involvement and incompetent handling of the related administrative and state court litigation regarding the sign." (Pl. Response, at 3.) Plaintiffs find it significant that the original complaint, the FAC, and the Seventh Circuit's earlier decision in this case all discuss Whiteco's involvement "in great detail." (*Id.*)

It is true that Whiteco's actions provide factual background for Plaintiffs' constitutional claims against the City, and Plaintiffs may be correct that Whiteco did not competently prosecute the administrative and state

court cases. *See General Auto Service Station*, 319 F.3d at 906-07 ("Whiteco did not prosecute even the state-law theories competently"). Those facts, however, are unrelated to whether the City violated Plaintiffs' due process rights which, in turn, is unrelated to whether Lamar breached its contractual obligations to indemnify Plaintiffs for this lawsuit. The constitutional claims will be wholly unaffected if the contract claim is dismissed, and the contract claim can be resolved regardless of whether the City is found to have violated Plaintiffs' constitutional rights. *See, e.g., Eager v. Commonwealth Edison Co.*, 187 F. Supp. 2d 1033, 1040 (N.D. Ill. 2002) (in Title VII case, court did not have supplemental jurisdiction over employee's electrocution claims, even though electrocution was caused by exhaustion on the job, where there was no evidence the employer required excessive hours of work as a form of sexual discrimination, and the Title VII claims "would be unaffected if the electrocution claims were dismissed"). Lamar's motion to dismiss for lack of subject matter jurisdiction is therefore granted. *See Van Harken v. City of Chicago;* 103 F.3d 1346, 1354 (7th Cir. 1997) ("we acknowledge the broad discretion of district judges in making judgments concerning the retention of supplemental claims").

CONCLUSION

For the reasons stated above, the City of Chicago's Motion to Dismiss (Docket No. 68-1) is granted in part and denied in part, and Lamar Advertising Company's Motion to Dismiss (Docket No. 73-1) is granted. Counts I, II, V, VI, and VII of the FAC are dismissed. Defendant Lamar is dismissed from this case without prejudice to a state court action on Plaintiffs' claims

against Lamar.

Dated: March 9, 2004

REBECCA R. PALLMEYER

United States District Judge

Footnotes

[1] Plaintiffs' First Amended Complaint is cited as "FAC Par ."

[2]Defendant Lamar is the successor in interest to Whiteco and is the current lessee of the wall space where the sign is located.

[3] Plaintiffs' Response to the City of Chicago's Motion to Dismiss Plaintiffs' Amended Complaint is cited as "Pl. Response, at ." Defendant City of Chicago's Memorandum in Support of its Motion to Dismiss Plaintiffs' First Amended Complaint is cited as "City Mem., at ."

[4]Section 6.7-1(a) states that "any sign that does not conform to Sections 8.9(5), 8.9(6), 8.9(7), 9.9(5), 9.9(6), 9.9(7), 10.14(5), 10.14(6), or 10.14(7) of this chapter as amended by this ordinance, and that was lawfully erected pursuant to a permit lawfully issued prior to the effective date of this section, may remain in use as a legal non-conforming sign."

Section 14-40-040 states that "it shall be unlawful to begin the erection, alteration or enlargement of any sign, signboard or structure covered by the provisions

of this chapter of the code unless a permit therefore shall have first been obtained from the department of inspectional services . . ."

[5]Defendant City of Chicago's Reply Memorandum in Support of its Motion to Dismiss Plaintiffs' First Amended Complaint is cited as "City Reply, at ."

[6]Defendant City of Chicago's Surresponse in Support of its Motion to Dismiss the First Amended Complaint is cited as "City Surresponse, at ."

[7]Plaintiffs do not dispute that their constitutional claims are cognizable only through § 1983. *See, e.g., Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) ("a litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. § 1983"); *Flores v. City of Chicago*, 682 F. Supp. 950, 953 (N.D. Ill. 1988) ("Section 1983 provides a cause of action against municipalities . . . and the availability of this statutory remedy precludes direct claims under the Constitution").

[8] Plaintiffs' Surreply in Further Response to Defendant City of Chicago's Motion to Dismiss Plaintiffs' First Amended Complaint is cited as "Pl. Surreply, at ."

Nos. 05-2515 & 06-2672
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GENERAL AUTO SERVICE STATION, et al.,
Plaintiffs-Appellants,
v.
CITY OF CHICAGO,
Defendant-Appellee.

7/11/2008

JUDGES: Before Hon. KENNETH F. RIPPLE, Circuit Judge, Honorable ILANA DIAMOND ROVNER, Circuit Judge, Hon. DIANE S. SYKES, Circuit Judge.

ORDER

No judge of the court having called for a vote[1] on the Petition for Rehearing or Rehearing En Banc filed by Plaintiffs-Appellants on June 13, 2008, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the Petition for Rehearing or Rehearing En Banc is DENIED.

Footnote

[1]Judge Joel M. Flaum took no part in consideration of this matter.

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In Force from August 26, 1953
until March 25, 1970

86.1-4 Permit Required.

(a) It shall be unlawful to proceed with the erection, enlargement, alteration or rehang of any illuminated sign or illumination of signboard unless a permit therefor shall have first been obtained from the Commissioner of Buildings.

In Force from March 25, 1970
until November of 1994

86.1-4

Permit Required. It shall be unlawful to begin the erection, alteration or enlargement of any sign, signboard or structure covered by the provisions of this Chapter of the Code unless a permit therefor shall have first been obtained from the Bureau of Electrical Inspection.

86.1-2. Definitions.

For purposes of this Chapter: (g) Signboards (billboards and paintboards and posted panelboards) are signs which fall into the general classification commonly known by these or other titles.

105a

In Force from November of 1994
until March 5, 2003

14-40-040 Permit required (replacing 86.1-4)

It shall be unlawful to begin the erection, alteration or enlargement of any sign, signboard or structure covered by the provisions of this chapter of the code unless a permit therefor shall have first been obtained from the department of inspectional services.

14-40-020 Definitions.

For purposes of this Chapter: (g) "Signboards" (billboards and paintboards and posted panelboards) are signs which fall into the general classification commonly known by these or other titles.

In Force from March 5, 2003
until November 13, 2007

13-20-550 Permits required (replacing 14-40-040)

It shall be unlawful to begin the erection, alteration, repair, or enlargement of any sign, signboard or structure covered by the provisions of this article, unless a permit has been obtained from the department of construction and permits.

In Force from November 13, 2007 to Present

13-20-550 Permits required.

(a) It shall be unlawful for any person: (1) to erect, install, alter, repair or enlarge any sign, signboard or structure covered by the provisions of this article; or (2) to commence to erect, install, alter, repair or enlarge any sign, signboard or structure covered by the provisions of this article; or (3) to cause any sign, signboard or structure covered by the provisions of this article to be erected, installed, altered, repaired or enlarged, unless a valid permit has been obtained from the department of buildings.

In Force from March 5, 2003 to Present

13-20-510 Definitions.

For purposes of this article, the following additional definitions apply: "Signboards," "billboards," "paintboards" and "posted panelboards" are signs which fall into this general classification and are commonly known by this or other titles.

In Force from August 26, 1953
until March 25, 1970

86.1-5. Applications.

Applications for permits for illuminated signs shall be made only by registered electrical contractors and shall be countersigned by bonded sign erector *where applicable,* and be in such form as shall be prescribed by the Commissioner of Buildings. Applications for permits for illumination of signboards shall be made only by registered electrical contractors and shall be in such form as shall be prescribed by the Commissioner of Buildings.

In Force from March 25, 1970
until November of 1994

86.1-5. Permit Application.

Applications for permits to erect, install or alter signs; or illuminate signboards; or maintain the electrical components of electrical signs shall be made by registered electrical contractors. Where applicable such applications shall be countersigned by bonded sign erectors. Applications for permits to erect, install or alter signboards or structures shall be made by bonded sign erectors. All such applications shall be in such form as is prescribed by the Commissioner of Buildings.

In Force from August 26, 1953
until March 25, 1970

86.1-12

Council Approval. No projecting illuminated sign over public property exceeding 100 square feet in area of one face shall be erected except under the authority of a City Council order in addition to the regular permit. Projecting illuminated signs containing less than 100 sq. ft. in area of one face shall not require council approval but five days notification shall be given alderman in whose ward sign is to be erected. Council approval shall be required on roof or ground signs over 60 feet in height.

In Force from March 25, 1970
until June 9, 1982

86.1-11

Council Approval. A City Council Order shall be required in addition to the normal permit for:

(a) any electric sign which projects over the public way and which exceeds 100 square feet in area of one face.

(b) roof or ground signs, structures or signboards over sixty feet in height.

Council approval is not required for any other projecting sign, however the Alderman of the ward in which any sign which projects over the public way is to be erected shall be given notification of such sign.

In Force from June 9, 1982
until July 12, 1990

86.1-11

Council Approval. A City Council Order shall be required in addition to the normal permit for:

(a) any electric sign which projects over the public way and which exceeds 100 square feet in area of one face.

(b) All roof or ground signs, structures or signboards over 24 feet in height, or having any face which exceeds 100 square feet in area of one face. Council approval is not required for any other projecting sign, however the alderman of the ward in which any sign which projects over the public way is to be erected shall be given notification of such sign.

In Force from November of 1994
until February 5, 1998

14-40-120 Council Approval.

A city council order shall be required in addition to the normal permit for any sign which exceeds 100 square feet in area of one face or any roof or ground sign, structure or sign board over 24 feet in height.

The council order upon being introduced to the council shall be forwarded to the appropriate committee for hearing. The committee hearing shall recommend approval or disapproval. A recommendation of this disapproval shall be passed based on the following considerations:

(1) The size, location or structural design of the sign is not compatible with the character of the community in which the sign is to be erected;

(2) The sign is to be located in an area where there exists an undue concentration of signs; or

(3) The size, location or structural design of the sign presents an unreasonable threat to the health or safety of the public.

Any committee report requesting this disapproval must state specific reasons for the recommendation, which reasons shall be consistent with any applicant's constitutional rights contained in the First, Fifth and Fourteenth Amendments of the United States

Constitution and Sections 2 and 4 of Article I of the Illinois Constitution of 1970.

Section 14-40-120 of the Municipal Code of Chicago is hereby amended by deleting the language in brackets and inserting the language in italics as follows:

14-40-120 Council Approval. (February 5, 1998)

A city council order *approving a sign* shall be required in addition to the normal permit for any sign which exceeds 100 square feet in area of one face or any roof or ground sign, structure or sign board over 24 feet in height. *Before the application for a permit for such sign is filed with the commissioner, the applicant shall submit a duplicate of the application to the alderman of the ward in which the sign is to be located. At the time the duplicate application is submitted to the alderman, the applicant shall submit to the city clerk an order for the approval or disapproval of the sign for introduction at the next regular meeting of the city council, and proof that the public notice provided for in this section has been given and a list of all persons who have been given such notice.* The council order upon being introduced to the council shall be forwarded to the appropriate committee for hearing. *Prior to filing its application, the applicant for the permit shall give notice to all voters registered at addresses within 250 feet at the proposed sign location. The notice shall be in writing and shall state: the name of the applicant, the proposed location of the sign, the exterior dimensions of the proposed sign, the means of illumination of the sign, the height above ground level at which the proposed sign, if approved, will be located, and the date of the application; and shall inform the recipient that he or she will receive notice of the date of a public hearing on the application before the committee, and that he or she has the right to testify before the*

committee. The notice shall be sent by certified mail, return receipt requested, with all costs to be borne by the applicant. No notice need be given under this section, however, of any application seeking a permit for a sign to be erected on the premises of a business only limited to information identifying the business conducted on the premises. The committee *shall give notice by first class mail to all voters registered at addresses within 250 feet of the proposed sign location and, after conducting a* hearing, shall recommend approval or disapproval. *The hearing shall be recorded or transcribed. At the hearing, the applicant shall have the right to offer evidence and comment on or rebut all other evidence placed before the committee.* A recommendation [of this disapproval] shall be [passed] based *only* on the following considerations:

(1) *Whether* the size, location or structural design of the sign is not compatible with the aesthetic character of the community in which the sign is *located or is* to be erected [; or] *because of the sign's impact on or proximity to:*

(i) special zones or places as may be designated, established or recognized by the City of Chicago, including but not limited to the Lake Michigan and Chicago Lakefront Protection District, and historical or architectural landmark buildings, areas, places, districts, structures or other objects; or

(ii) waterways, open space areas, recreational facilities, urban or scenic vistas or residential buildings; or

(2) *Whether* the sign is *located or is* to be located in

an area where there exists an undue concentration of signs *in light of the aesthetic character of the area; or*

(3) *Whether* the size, location or structural design of the sign presents an unreasonable threat to the health or safety of the public.

Any committee report requesting this *approval or* disapproval must state specific reasons for the recommendation, which reasons shall be consistent with any applicant's constitutional rights contained in the First, Fifth and Fourteenth Amendments of the United States Constitution and Sections 2 and 4 of Article I of the Illinois Constitution of 1970. *The recommendation of the committee to approve or disapprove the permit as provided herein shall not be based on the content of the proposed sign. In determining whether to issue an order approving or disapproving a sign, the city council shall be bound by the same standards as apply to the committee in making its recommendation. The commissioner shall issue a permit for a sign that is subject to this section unless: (1) the city council has issued an order disapproving the application within 60 days after the order for the sign was submitted to the city clerk, or (2) the sign for which the application is submitted is not or will not be in compliance with any provision of this Code. If the city council fails to issue an order disapproving an application for a sign within a 60 day period after the order for the sign is submitted to the city clerk, an order approving the sign shall be deemed to have been issued at the end of such period. The city clerk shall, within two business days, notify the commissioner whenever the city council issues or is deemed to issue an order approving or disapproving a sign permit application. In any event the*

commissioner may not take final action on the application until the city council issues or is deemed to issue an order to recommend approval or disapproval of the application. The commissioner, however, must take final action on the application no later than 75 days after the order for the sign permit was submitted to the city clerk.

Any person aggrieved by the final decision of the commissioner disapproving an application may seek judicial review of the decision in the manner provided by law.

As used in this section, "legal voter" means a person who has registered to vote and whose name appears on a poll sheet from the last preceding election regardless of whether primary or general.

In Force from January 1, 1961
until July 12, 1990

8.9(7) (Known as 8.9(5) until Renumbered as 8.9(7) on July 8, 1976)

No advertising sign shall be permitted within 75 feet of any property in a Residence District.

In Force from July 12, 1990
until November 1, 2004

8.9(7)

No advertising sign having a face which exceeds 100 square feet shall be permitted within 250 feet of a Residence District. No advertising sign shall be permitted within 75 feet of a Residence District.

In Force from November 1, 2004
(when 8.9(7) was Repealed in Place
of 17-12-1006A) until March 9, 2005

17-12-1006A

1. *Off-premise signs* with a *sign* face area of more than 100 square feet are prohibited within 250 feet of an R or DR district.

2. *Off-premise signs* are prohibited entirely within 100 feet of an R or DR district.

In Force from March 9, 2005 to Present

17-12-1006A

1. *Off-premise signs* with a *sign* face area of more than 100 square feet are prohibited within 250 feet of any *residential* district.

2. *Off-premise signs* are prohibited entirely within 100 feet of any *residential* district.

In Force from November 1, 2004 to Present

17-17-02147. Residential District.

Any R or DR zoning district or residential planned development.

In Force from January 1961
until November 1, 2004

3.2 Definitions

Sign, Advertising. An "advertising sign" is a sign which directs attention to a business, commodity, service, or entertainment conducted, sold, or offered elsewhere than upon the premises where such sign is located, or to which it is affixed.

In Force from November 1, 2004 to Present

17-17-02108

Off-Premise Sign. A *sign* that directs attention to a business, commodity, service, or entertainment conducted, sold, or offered elsewhere than upon the *lot* upon within (sic) is located or to which it is affixed.

In Force from July 12, 1990
until November 1, 2004

6.7-1(a) (a/k/a section 17-24-250(a) of the Code)

> Any sign that does not conform to Sections 8.9(5), 8.9(6), 8.9(7), 9.9(5), 9.9(6), 9.9(7), 10.14(5), 10.14(6), or 10.14(7) of this chapter, as amended by this ordinance, and that was lawfully erected pursuant to a permit lawfully issued prior to the effective date of this section, may remain in use as a legal non-conforming sign.

In Force for Two Days from
November 1, 2004 until
November 3, 2004

17-15-0502

A *nonconforming sign* is a *sign* that was lawfully established, in accordance with zoning and other sign regulations in effect at the time of its establishment but that is no longer allowed by the regulations of this Zoning Ordinance.

17-15-0503

Nonconforming signs may remain in use, subject to the regulations of this Section (Section 17-15-0500) and all other applicable requirements of the Municipal Code.

In Force from November 3, 2004 to Present

17-15-0502

A *nonconforming sign* is a *sign* that was lawfully established pursuant to a lawfully issued permit but that is no longer allowed by the regulations of this Zoning Ordinance.

17-15-0503

Nonconforming signs may remain in use, subject to the regulations of this Section (Section 17-15-0500) and all other applicable requirements of the Municipal Code. *Nonconforming signs* must be maintained in good repair, and must comply with all other requirements of this Zoning Ordinance.

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No. 08-636 (2)

FILED

MAR 11 2009

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

GENERAL AUTO SERVICE STATION, an Illinois Corporation, F.A.Y. PROPERTIES, INC., an Illinois Corporation, and COSMOPOLITAN BANK AND TRUST, Successor to the Cosmopolitan National Bank of Chicago, Not Individually but as Trustee under Trust Agreement dated December 21, 1994 and Known as Trust #27340,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners lack standing.

2. Whether petitioners' claim is time barred.

3. Whether this Court should decline to review a non-existent conflict between decisions of the Seventh and Ninth Circuits, where petitioners did not present to the courts below the issue they now assert, and petitioners misrepresent what was decided in both cases.

4. Whether this Court should decline to review a non-existent conflict between decisions of the Seventh and First Circuits, where petitioners did not present to the courts below the issue they now assert, and the different outcomes reflect the different facts of the cases.

5. Whether this Court should decline to review a non-existent conflict in the "approach" used by two Courts of Appeals examining different ordinances of different municipalities when there is no difference in "approach"; even if there were, rectifying a difference in "approach" has no nationwide significance; and the different outcomes reflect the different facts of the cases.

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IN THE

Supreme Court of the United States

No. 08-636

GENERAL AUTO SERVICE STATION, an Illinois Corporation, F.A.Y. PROPERTIES, INC., an Illinois Corporation, and COSMOPOLITAN BANK AND TRUST, Successor to the Cosmopolitan National Bank of Chicago, Not Individually but as Trustee under Trust Agreement dated December 21, 1994 and Known as Trust #27340,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

STATEMENT

The sign at issue in this case was erected without a permit in 1962 on the side of petitioners' building in Chicago. Pet. App. 2a-3a.[1] The sign was used for ad-

[1] For simplicity, we will use "petitioners" to refer to all petitioners, without differentiating among them for purposes of actions taken by any or all of them or by petitioners' former

vertising from the date it was erected until 2008, when petitioners finally removed it after losing below. Pet. 4-5; Pet. App. 3a. The district court interpreted the City's Municipal Code in force at the time the sign went up to require a permit only for the erection of illuminated signs, and the City and the Seventh Circuit accepted that reading for purposes of the appeal. Pet. App. 3a. The district court also interpreted the Code from that time period to authorize advertising signs that, like this one, were located within 75 feet of a residence district, provided they were not also within 75 feet of improved property in that district. *Id.* at 3a-4a. The City and the Seventh Circuit likewise accepted that reading for purposes of the appeal. *Id.* at 4a. The courts and the parties therefore proceeded below on the assumption that the sign was lawful when it was first erected. *Ibid.*

As both lower courts and even petitioners agree, petitioners later made two changes to the sign that required a permit, and there is no evidence that petitioners ever applied for or obtained one. Pet. 5; Pet. App. 4a-5a, 104a. First, between 1962 and 1969, petitioners installed lights on the sign. Pet. App. 4a. Second, between 1975 and 1979, petitioners combined two smaller signs into a larger sign and, in 1979, enlarged the sign to 26 feet by 59 feet, the size it remained until it was removed. *Ibid.*

In 1986, the City issued a violation notice asserting that petitioners' sign had been installed without a permit in violation of the Code. Pet. App. 5a. After scheduling and continuing a compliance hearing on

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owners or agents. The distinctions among these parties are not relevant to the issues presented here.

several occasions, the City took no further action on the notice. *Ibid.*

In 1990, the City revised the Code to prohibit all advertising signs within 75 feet of a residence district and advertising signs larger than 100 square feet within 250 feet of a residence district. Pet. App. 5a, 118a. Petitioners' sign did not conform to the amended ordinance. Pet. 10; Pet. App. 5a-6a. The City also enacted a "grandfather provision," allowing signs that did not comply with this change, among others, to remain if they had been "lawfully erected pursuant to a permit lawfully issued prior to the effective date of this section." Pet. App. 5a, 120a.[2]

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[2] As petitioners note, the Seventh Circuit mistakenly believed that the current version of the grandfather provision no longer contains the requirement that the sign already have a permit. Pet. 15 n.6; see also Pet. App. 33a n.3. Although this requirement was deleted from a revision of the ordinance enacted on November 1, 2004, it was reinstated two days later. Pet. 15 n.6; Pet. App. 121a. What petitioners fail to bring to this Court's attention is the reason the Seventh Circuit "overlooked" (Pet. 15 n.6) the November 3 reinstatement–petitioners' affirmative representation that the November 1 ordinance deleting the requirement was the version in effect. Petitioners asserted that the City had taken "the affirmative step of 'correcting' this provision" by deleting the permit requirement and that the grandfather provision was applicable if a sign was "lawfully established," with or without a permit. Amended Brief and Short Appendix of Appellants, Nos. 05-2515 & 06-2672 (cons.), at 27-28 (7th Cir.) ("Petrs. CA Br."). Petitioners made these representations even though the City had brought the November 3 amendment to their attention in the district court (R. 115 ¶ 3); they addressed it there (R. 119 at 2-8); and they included the November 3 version in their appendix (Appellants' Appendix of Additional Contents Pursuant to Seventh Circuit Rule 30(b), Nos. 05-2515 & 06-2672 (cons.), at 228 (7th Cir.) ("CA Rule 30(b) App.")). What the court below actually "overlooked" was the footnote in the City's brief explaining all of

In September 1994, the City issued another violation notice, this time charging that petitioners' sign violated the 1990 distance requirement. Pet. App. 5a-6a. In response, petitioners applied for a permit, and the City's zoning department determined (mistakenly, in the City's current view) that the sign was a legal, nonconforming use. Pet. 11; Pet. App. 6a. Petitioners never obtained a necessary City Council order approving the sign, and no permit issued. Pet. App. 6a. The City took no further action on the 1994 violation notice. Pet. 12; Pet. App. 6a.

In August 1997, the City issued a third violation notice directing petitioners to obtain a permit "for outdoor flat building sign installed without permit." Pet. App. 6a (internal quotation marks omitted). In September 1997, petitioners appeared before the City's Department of Administrative Hearings and admitted noncompliance with the permit requirement. *Id.* at 7a. The City entered a finding that the sign was in violation of the Code. *Ibid.*; CA Rule 30(b) App. at 117. Petitioners were given an opportunity to comply, and thereafter filed a permit application. Pet. App. 7a. This time, the City's zoning department denied zoning certification for the sign because it violated the 1990 distance requirement and could not be grandfathered because it lacked a prior permit. *Ibid.* Petitioners pursued the denial of

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this. Brief and Appendix of Defendant-Appellee City of Chicago, Nos. 05-1515 & 06-2672 (cons.) at 39 n.15 (7th Cir.) ("City CA Br."). Of course, it was convenient at that time for petitioners to misrepresent the scrivener's error as a "correction" so they could argue, to further their substantive due process claims, that the prior permit requirement was arbitrary and irrational, even in the City's view. Petrs. CA Br. at 26-28. Petitioners present the correct version now that they understand their version puts them at risk of mootness (which we do not argue).

zoning certification all the way to the Illinois Supreme Court, but it was not overturned. *Id.* at 7a-8a. In the meantime, the City fined petitioners and ordered the sign's removal. *Id.* at 7a.

Petitioners filed this suit on January 19, 2000. R. 1-1. Their complaint included First Amendment and due process claims (both procedural and substantive), among others. Pet. App. 9a. Under the First Amendment, petitioners challenged the City's application of the permit requirement and the distance requirement to prohibit the sign, claiming that "the commercial speech contained in the . . . Sign concerns a lawful activity that is not misleading, and which the City has no[ ] legitimate or substantial interest in restricting or prohibiting." R. 61 at 11.

The City moved to dismiss. R. 68. In response, petitioners described their First Amendment claim as an "as applied" challenge to the City's "arbitrary and irrational" application of the Code's provisions that permitted nonconforming advertising signs to remain if they were legally erected pursuant to a permit but not if they were "legally erected or painted without a permit simply because no permit was required by the Code, as in the instant case." R. 77 at 7. According to petitioners, the City "has no legitimate interest under the First Amendment in making such an irrational and arbitrary distinction among non-conforming advertising signs." *Ibid.* They urged analysis under the scrutiny applicable to content-based, rather than content-neutral, regulations because the provisions had been applied to an advertising sign containing commercial speech. *Id.* at 7-9. The district court dismissed this claim (and all but the two substantive due process claims). Pet. App. 76a-101a. The court understood petitioners' First Amendment

claim to challenge the Code "as applied to their sign because it allows advertising signs to remain as legal, nonconforming signs if they predated the 1990 amendments and were erected pursuant to a valid permit, but not if the signs predated the 1990 amendments and were erected without a permit, even if no permit was required at the time." *Id.* at 81a-82a. The court rejected petitioners' argument that the challenged provisions were content based, recognizing that the grandfather provision applies to all signs, not just adverting signs, and it, rather than the underlying regulation of commercial speech, prevented petitioners' sign. *Id.* at 84a. Additionally, petitioners' First Amendment challenge did not state a claim because it was "nothing more than a restatement of [their] arguments that the City's refusal to grandfather [their] sign deprives [them] of due process." *Id.* at 84a-85a (internal quotation marks omitted).

The case proceeded to a bench trial on the substantive due process counts. Pet. App. 12a. In petitioners' post-trial brief, as part of their argument that they had a vested property interest in the sign for purposes of these claims, they asserted that, despite their failure to obtain a permit when the sign was illuminated and enlarged in the 1960s and 1970s, the sign remained a legal use because the permit requirement from that time violated the First Amendment as an illegal prior restraint. R. 114 at 27-29. The district court first refused to consider the argument because, in its view, petitioners had not explained how the permit requirement "constitute[d] a regulation of commercial speech sufficient to implicate the First Amendment." Pet. App. 71a. The court also recognized petitioners' argument as merely restating petitioners' procedural due process claim,

which was time barred. *Ibid.* Ultimately, the court did not address the merits of the claim that the permitting scheme was an invalid prior restraint–with unbridled discretion and no adequate time limits–because petitioners "did not qualify for a permit under the relevant zoning laws and, thus, the delay or discretion in issuing such a permit could not have violated [their] rights." *Ibid.* The court entered judgment for the City on the substantive due process claims, in part because petitioners' sign became illegal when it was illuminated and enlarged without a permit. *Id.* at 71a, 73a.

Petitioners repeated their prior restraint argument in a motion to modify the judgment. R. 128 at 5-10. In its decision, the court again stated that the permit requirement did not "implicate[ ] First Amendment concerns" (Pet. App. 42a) because the ordinance did not pose a sufficient threat of censorship to give rise to a facial challenge (*id.* at 41a-45a). A facial challenge was impermissible because "[a] permit requirement that applies only to illuminated signs without distinguishing between commercial and noncommercial speech is too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* at 45a (internal quotation marks omitted). The court did not address the constitutionality of the permit requirement on the merits.

Petitioners' appellants' brief below described their First Amendment claim as a challenge to allowing grandfather status for nonconforming advertising signs lawfully erected pursuant to a permit, but not for nonconforming advertising signs, such as its sign, "where the advertising sign was lawfully erected, but where there had been no prior requirement to obtain

a sign permit for its lawful erection." Petrs. CA Br. at 44-45. Petitioners claimed it was arbitrary to require a permit for the sign to remain, when none was needed when erected. *Id.* at 45. Petitioners asserted that the distance requirement that rendered their sign nonconforming and the grandfather provision that denied legal nonconforming status to the sign were, together, content-based regulations subject to heightened scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), rather than the diminished scrutiny for content-neutral regulations. Petrs. CA Br. at 45-46. Their brief canvassed *Central Hudson*'s four-part test (*id.* at 46-48), claiming the ordinances failed parts three and four because "the City has no legitimate interest under the First Amendment in making an irrational and arbitrary distinction among nonconforming advertising signs" and there is no "'reasonable fit' between the . . . restriction against some, but not all, legally erected advertising signs" (*id.* at 47). Petitioners made no argument that the regulations violated the First Amendment even if content neutral.

Petitioners' substantive due process argument asserted that the City's permit requirement in effect in the 1960s and 1970s when the sign was illuminated and enlarged was an unconstitutional prior restraint. Petrs. CA Br. at 35-41. This argument aimed at the district court's conclusion that their failure to obtain a permit for the illumination and enlargement of the sign caused it "to become an illegal use, and therefore unqualified for legal nonconforming status" and also "to show a 'separate constitutional violation,' as may be required [in the Seventh Circuit] to prove denial of . . . substantive due process rights." *Id.* at 41. Petitioners contended that the former permitting scheme was not content neutral, but also argued that it was

unconstitutional even if it were. *Id.* at 37, 40-41. Because petitioners challenged the prior version of the permit requirement only in the context of substantive due process, the Court of Appeals considered it "only within the context of whether a due process property right had been established." Pet. 16.

In reply on the First Amendment claim, petitioners again asserted that the distance requirement and the grandfather provision, in combination, were content-based regulations subject to heightened scrutiny. Appellants' Reply Brief, Nos. 05-2515 & 06-2672 (cons.), at 19 (7th Cir.) ("CA Reply Br."). They also claimed, for the first time, that there was no fit between the regulations' restrictions and their purpose because the provisions distinguished between advertising signs erected pursuant to a permit "and other advertising signs not erected pursuant to a permit (and not allowed to remain) because they were not established with a permit obtained under an unconstitutional sign-permitting scheme." *Id.* at 20 (emphasis omitted). The Seventh Circuit did not appear to notice this shift, but the argument made for the first time in reply was waived under Circuit precedent.

The Court of Appeals affirmed the dismissal of petitioners' First Amendment claim, holding that petitioners had not stated a claim for the regulation of commercial speech:

> True enough, section 8.9(7) of the zoning ordinance [the distance requirement] is a regulation of commercial speech, in that it specifically bans advertising signs larger than 100 square feet from being located within 250 feet of a residence district. But [petitioners] do[ ] not contend that the constitutionality of section 8.9(7) itself is

> suspect. . . . [Their] attack, as the district court recognized and as [their] appellate brief makes plain, is on the grandfather provision of section 6.7-1(a), and the differing treatment that provision grants to previously permitted signs as distinct from signs that were [erected] without a permit. Yet, the grandfather provision is not a provision that is triggered by the commercial content of the sign in question. As [petitioners] concede[ ], section 6.7-1(a) applies to all manner of signs, not just advertising signs. As such, we agree with the City that the grandfather provision is a content-neutral time, place, and manner restriction on speech rather than a regulation of commercial speech.

Pet. App. at 31a-32a. Because petitioners had not challenged the grandfather provision under the scrutiny applicable to content-neutral regulations, that argument was waived. *Id.* at 32a. In this Court, petitioners suggest that they did not waive the argument (Pet. 19-21)–pointing to their argument that "'even if [the court] were to find the City's [former] sign permitting scheme to be a content-neutral time, place and manner restriction, it still would not pass constitutional muster . . . .'" *Id.* at 19-20 (quoting brief). But that quotation is from their argument on their substantive due process claims (Petrs. CA Br. at 40-41), and petitioners nowhere argued that the distance requirement and the grandfather provision they challenged under the First Amendment were unconstitutional even as content-neutral regulations.

The Court of Appeals also affirmed judgment for the City on petitioners' due process claims. Pet. App. 29a. On the substantive due process claims, the court held that because petitioners had not obtained

the necessary permits when they illuminated and enlarged the sign in the 1960s and 1970s, they did not have a property interest in the sign under state law as required to challenge the refusal to grandfather the sign as a denial of substantive due process. *Id.* at 20a, 26a-29a. In reaching this conclusion, the court assumed, but did not decide, that the permit requirement from that time was unconstitutional and that petitioners were entitled to ignore it. *Id.* at 20a-22a. But the court concluded that being entitled to ignore an unconstitutional requirement did not confer a protected property interest (*id.* at 22a-27a): "[T]he supposed illegality of former incarnations of the zoning ordinance [did not] transform [petitioners'] unlicensed use of property into an authorized use and . . . give [them] a property interest in continued use of that property." *Id.* at 27a.

In their petition for rehearing, petitioners disputed the panel's determination on their First Amendment claim that the challenged provisions were content neutral. Appellants' Petition for Rehearing With Suggestion for Rehearing En Banc, Nos. 05-2515 & 06-2672 (cons.), at 17-18 (7th Cir.). According to petitioners, "[t]he panel's refusal to acknowledge that the sign regulation at issue is content-based is also in direct conflict with [*Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996)]." *Id.* at 18. They also revived the new spin on their First Amendment claim from their reply brief, describing the claim as a challenge to grandfathering advertising signs based on whether "the advertising sign had been erected (meaning also 'illuminated' or 'enlarged') pursuant to a permit under the then-existing unconstitutional permitting scheme." *Id.* at 16. According to petitioners, this "invoke[d]

content and viewpoint censorship." *Ibid.* The Seventh Circuit denied rehearing. Pet. App. 102a.

REASONS FOR DENYING THE PETITION

The reasons that this Court should decline review are numerous. Most important, petitioners lack standing. In addition, their suit is time barred, which should preclude this Court's review of all three issues. Each issue also suffers from a litany of flaws. None of the three presents an important conflict worthy of this Court's attention, especially once petitioners' misrepresentations are swept aside. The first two would require this Court to decide a constitutional issue in the first instance. And the decision below was correct in any event.

1. Petitioners lack standing to bring suit. Article III standing requires an injury in fact that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. See, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing is a prerequisite to this Court's subject matter jurisdiction, and the issue is not subject to waiver. See, *e.g.*, *United States v. Hays*, 515 U.S. 737, 742 (1995).

Here, petitioners' sign was illegal from its inception because it violated the Code's prohibition on advertising signs "within 75 feet of any property in a Residence District." Pet. App. 118a. Although the City chose not to dispute the district court's unfavorable interpretation of this provision for purposes of the appeal (see *id.* at 3a-4a), the parties joined issue on the question in the district court (see *id.* at 66a-68a). There, petitioners conceded that their sign was within 75 feet of a residence district when erected (see *id.* at 53a), but claimed that because it was not within 75 feet of any residential building, it did not

violate the provision (see *id.* at 66a). But the plain language of the ordinance compels a contrary conclusion. The dictionary defines "property" broadly enough to include any piece of real estate (see *id.* at 67a-68a), and "any property in a Residence District" therefore must refer to both improved and unimproved property. If the ordinance's intent had been to ban only signs within 75 feet of actual buildings, its language would have said that. This conclusion is supported by the trial testimony of the City's then-Acting Zoning Administrator. See *id.* at 67a.

Because the sign was unlawful when it was erected, the City could lawfully order the sign removed because it was too close to a residence district. And this reason remains true even if the City could not constitutionally prohibit or refuse to grandfather the sign based on petitioners' failure to comply with the permit requirement. Petitioners never challenged the constitutionality of the distance requirement itself, nor the constitutionality of the 1990 amendments to that provision (see Pet. App. 31a), which they concede rendered their sign nonconforming (see Pet. 9-10). They consequently lack standing because their claimed injuries cannot be redressed by a favorable decision. The Courts of Appeals are generally in agreement that plaintiffs lack standing to challenge sign ordinances where their signs are illegal under unchallenged provisions. See, *e.g.*, *Maverick Media Group, Inc. v. Hillsborough County*, 528 F.3d 817, 820-21 (11th Cir. 2008); *Midwest Media Property, L.L.C. v. Symmes Township*, 503 F.3d 456, 461-62 (6th Cir. 2007); *Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421, 430 (4th Cir. 2007); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006); *Harp Advertising Illinois, Inc. v. Village of Chicago*

Ridge, 9 F.3d 1290, 1291-93 (7th Cir. 1993); *cf. Renne v. Geary*, 501 U.S. 312, 319 (1991) (doubting redressability where unchallenged statute could be construed to prohibit same conduct as challenged statute). This Court should accordingly decline review.

2. Petitioners' suit is also time barred. The City raised a limitations defense in our motions to dismiss (see R. 12, 28, 68), and at trial (see R. 113), and revived the argument in our brief below with respect to all claims (see City CA Br. at 18-29, 46, 49-50 & n.19). The district court found petitioners' due process claims time barred. See Pet. App. 38a-41a, 62a-64a, 86a-92a. The Seventh Circuit expressly put aside the limitations defense in considering petitioners' substantive due process claims (see *id.* at 17a-19a), and did not mention the defense in ruling on petitioners' other claims. As prevailing party below, the City is entitled to defend the judgment "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

The relevant statute of limitations in a section 1983 action is the personal injury statute of limitations of the state where the injury occurred. See, *e.g.*, *Wallace v. Kato*, 549 U.S. 384, 387 (2007). In Illinois, that statute of limitations is two years. See, *e.g.*, *ibid.* The limitations period begins to run when "the plaintiff has 'a complete and present cause of action.'" *Id.* at 388 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 201 (1997)) (further internal quotation marks omitted). In this case, the City issued a violation notice to petitioners in August

1997 charging that the sign lacked a permit. See Pet. App. 6a. In September 1997, petitioners appeared at an administrative hearing and admitted that they had not complied with the permit requirement. See *id.* at 7a. The City found the sign to be in violation of the Code at that hearing. See *ibid.*; CA Rule 30(b) App. at 117. At that time, petitioners became aware, if they were not before, that their unpermitted sign was unlawful. Petitioners' First Amendment count specifically challenged the application of the permit requirement (along with the distance requirement). See R. 1-1; R. 61 at 11. Thus petitioners were aware of their injury in September 1997 and were required to file suit within two years of that date. Because they waited until January 2000 to bring suit (see R. 1-1), their suit is time barred.

The accrual of petitioners' claim was not delayed until they experienced all the consequences that would eventually flow from the determination that the sign was illegally erected without a permit. To be sure, the City afforded them an opportunity to mitigate the violation by seeking a permit. See Pet. App. 7a. But they could not fairly expect that their sign would be allowed to remain because the 1990 distance requirement, with which the sign admittedly did not comply, had by then been on the books for seven years. So, too, had the grandfather provision, which afforded legal nonconforming status only to signs with permits "lawfully issued prior to the effective date of this section"—in other words issued before 1990. *Id.* at 120a. Petitioners therefore were not entitled to wait to file suit until the City denied their futile request for a permit, nor were they entitled to wait until the City fined them and ordered the sign removed. It is settled that a cause of action accrues when the plaintiff knows or should know that

its rights have been violated, not when the full consequences of that violation are felt. See, *e.g.*, *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (*per curiam*); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). And it is further settled that accrual is not delayed until the plaintiff discovers a legal theory for its injury (see, *e.g.*, *United States v. Kubrick*, 444 U.S. 111, 122-24 (1979)), so petitioners were not entitled to wait until they had fully developed their theory why the application of the permit requirement to the sign violated the First Amendment. This Court should refuse to review a stale First Amendment claim.

3. Even if petitioners' claim is not time barred, none of the questions presented warrants this Court's consideration.

a. Petitioners' first question asserts that the Seventh Circuit's decision conflicts with a Ninth Circuit decision, *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895 (9th Cir. 2007). But resolving the question would require this Court to determine the constitutionality of the former version of the City's permit requirement in the first instance. Moreover, there is no conflict with *Outdoor Media* or this Court's decisions–the Seventh Circuit did not decide the issue that petitioners contend creates the conflict because petitioners presented a different First Amendment theory below. And even if the Seventh Circuit decided what petitioners contend, their claim fails on the merits.

i. In this Court, petitioners assert that the grandfather provision's requirement that signs have a prior permit violates the First Amendment because, they claim, the now-repealed permit requirement in effect when they were required but failed to obtain

one "was facially violative of the First Amendment as a prior restraint of speech" and the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests–especially, his interest in freedom of speech." Pet. 24 (internal quotation marks omitted). Resolution of this question would require that this Court determine in the first instance whether the former version of the permit requirement was actually unconstitutional, a point that we disputed below (see City CA Br. at 31-35), and neither lower court decided. The district court initially rejected the relevance of the argument for several reasons, none of them on the merits, including that it believed the City's former permitting scheme did not implicate First Amendment concerns; the argument merely restated petitioners' procedural due process claim, which was time barred; and petitioners "did not qualify for a permit under the relevant zoning laws and, thus, the delay or discretion in issuing such a permit could not have violated [their] rights." Pet. App. 71a. Later, the court reiterated its view that the permit requirement did not "implicate[ ] First Amendment concerns" (*id.* at 42a), and refused to consider the facial challenge, because it believed that there was not a close enough nexus to expression to pose a threat of censorship (see *id.* at 43a), and that the requirement was "too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse" (*id.* at 45a (internal quotation marks omitted)). For its part, the Seventh Circuit "accept[ed] without deciding that the features of the City's permitting scheme on which [petitioners] ha[ve] focused indeed rendered the permit requirement incompatible with the First Amendment, such that [they were] entitled to ignore it." *Id.* at 22a.

This Court "ordinarily do[es] not decide in the first instance issues not decided below." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168 (2004) (internal quotation marks omitted). That is because the Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005). There are no exceptional circumstances justifying departure from this practice in this case. Moreover, petitioners themselves offer little assistance to the Court, outlining their argument that the former version of the permit requirement was unconstitutional only in their statement, not their reasons for granting the petition. Because it would be possible to reach the merits of petitioners' first question only if the Court first resolved the underlying issue favorably to petitioners, this Court should decline review.

ii. The Seventh Circuit's decision does not conflict with *Outdoor Media* or any decisions of this Court because the Seventh Circuit did not hold what petitioners claim. Again, in this Court, petitioners' First Amendment claim challenges the grandfather provision's requirement that signs have a prior permit on the ground that the former version of the permit requirement was "a prior restraint of speech" and the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." Pet. 24 (internal quotation marks omitted). In the courts below, however, petitioners' First Amendment claim was very different. There, petitioners claimed it was arbitrary and irrational to grandfather signs that were lawfully established with a permit, but not signs that were lawfully established at a time no permit was required. In other words, the claim then turned on the position that the sign did not need a permit under applicable law, rather than that the sign actually did need a permit, but

petitioners were entitled to ignore the permit requirement because it violated the Constitution.

The evolution of petitioners' claim went as follows. The complaint alleged a First Amendment violation because "the commercial speech contained in the . . . Sign concerns a lawful activity that is not misleading, and which the City has no[ ] legitimate or substantial interest in restricting or prohibiting." R. 61 at 11. In response to the City's motion to dismiss, petitioners described their claim as challenging the Code's provisions that allowed nonconforming advertising signs to remain if they were legally erected pursuant to a permit but not if they were "legally erected or painted without a permit simply because no permit was required by the Code, as in the instant case" and argued that the City "has no legitimate interest under the First Amendment in making such an irrational and arbitrary distinction among non-conforming advertising signs." R. 77 at 7. The district court understood petitioners' argument exactly this way–as a challenge to the Code "as applied to their sign because it allows advertising signs to remain as legal, nonconforming signs if they predated the 1990 amendments and were erected pursuant to a valid permit, but not if the signs predated the 1990 amendments and were erected without a permit, even if no permit was required at the time." Pet. App. 81a-82a.

In the Seventh Circuit, petitioners again described their First Amendment claim as a challenge to the Code's authorization of grandfather status for nonconforming advertising signs that were lawfully erected pursuant to a permit, but not for nonconforming advertising signs, such as their sign, "where the advertising sign was lawfully erected, but where

there had been no prior requirement to obtain a sign permit for its lawful erection." Petrs. CA Br. at 44-45. In fact, they admitted that "the district court [had] correctly observed" that their First Amendment claim challenged the grandfather provision because it allows signs "to remain only if the signs were initially erected pursuant to a permit, regardless of whether such a permit was even required at the time the sign was erected." *Id.* at 45 (internal quotation marks omitted). According to petitioners, it was arbitrary to require a permit to remain when the sign had not needed a permit when erected. See *ibid.* They asserted that the Code's application to the sign failed *Central Hudson*'s test for content-based speech regulations because "the City has no legitimate interest under the First Amendment in making an irrational and arbitrary distinction among nonconforming advertising signs" and there is no "'reasonable fit' between the City of Chicago's restriction against some, but not all, legally erected advertising signs." *Id.* at 47.

Like the district court, the Seventh Circuit understood petitioners' argument exactly as they described it. According to the court, petitioners "contend[ ] that the City has no legitimate interest in grandfathering non-conforming advertising signs that were erected pursuant to a permit but not those, like [their] own, that were erected without one; that distinction, in [petitioners'] view, is irrational and arbitrary." Pet. App. 30a-31a. The court, therefore, addressed the argument presented–that the Code's application to the sign was a regulation of commercial speech that failed *Central Hudson* scrutiny–holding that the regulations were content neutral and that petitioners had waived a challenge under that scrutiny. See *id.* at 31a-32a.

For the first time, petitioners' reply brief altered the presentation of the First Amendment claim to resemble the argument they now make. Petitioners there contended that there was no reasonable fit between the challenged provisions' goals and restrictions because "the City is drawing a distinction between those advertising signs that were erected pursuant to a permit . . . and other advertising signs not erected pursuant to a permit . . . because they were not established with a permit obtained under an unconstitutional sign-permitting scheme." CA Reply Brief at 19-20 (emphasis omitted). The Court of Appeals can be forgiven for overlooking this new version of petitioners' claim, coming as it did in a sentence toward the very end of the section, and especially because petitioners offered no elaboration and did not cite *Outdoor Media* or any of the cases on which they now rely. And even if the Court of Appeals had noticed the shift, it was too little, too late–arguments not raised in the district court, not to mention arguments raised for the first time in a reply brief, are waived in the Seventh Circuit. See, *e.g.*, *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986).

To be sure, petitioners challenged the former version of the permit requirement as an unconstitutional prior restraint in both courts below, but only in the context of their substantive due process claims, not their First Amendment claim. In their post-trial brief, they relied on the supposed unconstitutionality of the permit requirement to justify ignoring that requirement, in an attempt to show their sign was lawful at all times, for purposes of establishing a property interest under Illinois law, a prerequisite to their due process claims. See R. 114 at 27-29. This was years after the court had dismissed their First

Amendment claim. And in the Seventh Circuit, as we explain, they did not link the alleged unconstitutionality of the former permit requirement to their First Amendment challenge until the reply brief, and that effort was half-hearted at best.

Contrary to petitioners' assertion, the Seventh Circuit did not hold that the City may condition "the right to continue [the] sign's display . . . upon prior compliance with [an] unconstitutional requirement without violating the First Amendment" (Pet. 23), nor that compliance with "an unconstitutional law is . . . 'requisite' for securing future speech rights if the government so dictates" (*id.* at 24). The court was never presented with this argument in any meaningful way, and the court's silence regarding the oblique reference in petitioners' reply brief is not equivalent to an express refusal to consider the argument, let alone a holding that it does not violate the First Amendment to condition future speech rights on compliance with an unconstitutional permit requirement. Instead, the court addressed the First Amendment argument petitioners actually made—that the Code's application to the sign was a regulation of commercial speech that failed *Central Hudson* scrutiny. See Pet. App. 30a-32a. It strains reason to read the decision as conflicting with *Outdoor Media* or "carv[ing] out an exception" (Pet. 24), to any of this Court's doctrines by not deciding an issue that was not properly presented. Because the Court of Appeals did not hold what petitioners claim, its decision does not present the conflict petitioners claim.

iii. The conflict with *Outdoor Media* does not exist in any event because it does not hold what petitioners claim, either. The legal issue there was not whether future speech can be conditioned on com-

pliance with an unconstitutional restriction on speech; instead it was whether a permit applicant can bring a First Amendment challenge to an unconstitutional ordinance without ever holding a permit. In that case, a municipality denied a permit to erect billboards under an ordinance it later repealed, and the plaintiff challenged the constitutionality of the prior ordinance on several grounds. See *Outdoor Media*, 506 F.3d at 899. The Ninth Circuit affirmed the dismissal of the procedural due process claim because, without a permit, the plaintiff lacked a vested property right under state law. See *id.* at 902-03. With respect to the First Amendment claim, however, the lack of a permit did not bar a challenge because a vested property right is not required for such claims. See *id.* at 903. On the merits, the court held that the ordinance did not violate the prior restraint doctrine, was not an unconstitutional regulation of commercial speech, but may have impermissibly regulated non-commercial speech. See *id.* at 904-06.

Petitioners imply that the Seventh Circuit's decision conflicts with *Outdoor Media* because of the Ninth Circuit's statement that "'[t]he establishment of a vested property right is irrelevant to [a First Amendment claim].'" Pet. 22 (quoting *Outdoor Media*, 506 F.3d at 903). But the decisions are perfectly consistent on this point. The Ninth Circuit considered the First Amendment claim on its merits even though the plaintiff lacked a vested property right (see 506 F.3d at 903), and the Seventh Circuit did so as well, despite holding that petitioners lacked a vested property right (see Pet. App. 26a-27a, 29a-32a).

Petitioners also assert that the Seventh Circuit's decision conflicts with something "the Ninth Circuit in *Outdoor Media* observed"–that the government

"may not deny a benefit to a person on a basis that infringes his constitutionally protected interests–especially his interest in freedom of speech." Pet. 23 (internal quotation marks omitted). A conflict with the Ninth Circuit's observations, as opposed to its holdings, is not worthy of this Court's attention. But as important, as we explain above, the Seventh Circuit never held to the contrary. Petitioners did not even cite *Outdoor Media* below, so its observations must not have been particularly relevant to the arguments petitioners were then making. In short, there is no conflict to resolve.

iv. Even if both courts had held what petitioners claim and were in true conflict, petitioners' claim fails on the merits. It depends on the premise that the former permit requirement violated petitioners' constitutional rights and, moreover, that such a violation cannot be the basis for even collateral consequences. In this case, the premise is unfounded. The former version of the permit requirement did not violate petitioners' rights. The constitutional infirmity of the permit requirement, according to petitioners, is that as a prior restraint, it lacked sufficient time limits and guidelines for official discretion and could have been used as a tool to censor speech. But petitioners' speech was never censored. They ignored the permit requirement, and their sign remained up for decades. Without any initial intrusion on petitioners' speech rights, they are ill positioned to claim that the Seventh Circuit "let stand a severe penalty upon the exercise of that First Amendment right." Pet. 21.

Regardless, even where an individual's constitutional rights have been violated, the government does not necessarily violate the Constitution anew by taking the underlying conduct into account. For ex-

ample, in *Lewis v. United States*, 445 U.S. 55 (1980), this Court allowed the use, to criminalize the possession of firearms, of a felony conviction that was unconstitutional under the Sixth Amendment. See *id.* at 66-67. According to the Court, "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." *Id.* at 66. The Court distinguished several cases, including *Burgett v. Texas*, 389 U.S. 109 (1967), that had refused to allow the use of unconstitutionally-obtained convictions for certain purposes, such as sentence enhancement, that depend on the reliability of the conviction, and made quite clear that "[t]he Court . . . has never suggested that an uncounseled conviction is invalid for all purposes." 445 U.S. at 66-67. Thus, enforcement efforts that violate an individual's constitutional rights can sometimes form the basis for future penalties.

This case aligns with *Lewis* and not *Burgett*. On petitioners' view of the ordinance, the City has granted a benefit–grandfather status for signs that no longer comply with zoning laws–only to those who previously complied with an unconstitutional law and not to those who did not comply. But that distinction does not turn on a determination with suspect reliability, as in *Burgett*. Petitioners readily admit they did not comply with the prior law, although they think they were "'entitled to ignore it.'" Pet. 16-17 (quoting Pet. App. 22a). Just as in *Lewis*, where it was rational for the government to penalize all individuals with felony convictions–even those whose convictions were obtained unconstitutionally–by criminalizing weapons possession, here it is rational for the City to penalize sign owners who did not comply with the permitting requirements, even if unconstitu-

tional, by refusing to grandfather their nonconforming signs.

Nor does the refusal to grandfather petitioners' sign turn on anything they said in the past or propose to say in the future. Tellingly, no one is entitled to the benefit of grandfather status, and it is not granted based on which signs spoke (they all did) or the contents of what the signs said, but whether the signs went through the necessary steps to demonstrate compliance with applicable zoning when erected. This is far different from being denied a job because of the contents of past speech or political association, which makes the concerns identified in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), and *Perry v. Sindermann*, 408 U.S. 593 (1972), relied on by petitioners (see Pet. 23-24) irrelevant here. The distinction the City has drawn survives First Amendment review under the scrutiny applicable to content-neutral regulations, and petitioners have waived any argument to the contrary–both by not advancing it in their petition and not arguing it below. This Court should accordingly decline to review petitioners' first question.

b. Petitioners' second question is similarly flawed. It asserts that the Seventh Circuit's decision conflicts with *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989), because the First Circuit held that it violates the First Amendment when past lawful speech is used to decide which advertisers can continue to use nonconforming billboards. See Pet. 25.

i. As we explain above, to reach this question, this Court would need to decide in the first instance whether petitioners' past speech was in fact "lawful" because the former version of the permit requirement

was an unconstitutional prior restraint that they were entitled to ignore. This Court should decline to do so.

ii. Moreover, contrary to petitioners' assertion, the Seventh Circuit did not hold that there is no First Amendment violation where a municipality refuses to grandfather a sign because the sign's owner engaged in less favored speech by displaying a sign in violation of an unconstitutional permit requirement. See Pet. 26. Petitioners never presented that argument to the court, as we have explained. If they had, surely they would have cited *Somerville*, decided in 1989, but they did not. Instead, they contended that it violates the First Amendment to distinguish among signs that were equally lawfully established and to favor signs for which permits were required over signs for which permits were not. See Petrs. CA Br. at 44-45. There is consequently no conflict between the decisions to resolve.

iii. Contrary to another assertion, the First Circuit did not "face[ ] the same issue as the Seventh Circuit in the case below." Pet. 25. Instead, the First Circuit examined a grandfather provision that chose which signs to grandfather based on whether the sign, in the year before the ordinance's effective date, had displayed a particular type of commercial message. The court held that a municipality cannot penalize a speaker for the content of his past lawful speech by grandfathering only those nonconforming signs that did not contain that type of commercial message but not those nonconforming signs that did. See *Somerville*, 878 F.2d at 517-18. According to the court, the constitutional flaw with the provision was that "the distinguishing criterion [between signs that are permitted to remain and those that are not] is the content of past lawful speech." *Id.* at 520 (emphasis

added; original emphasis omitted). If the penalty had been based on something that the property owner had done in the past, like stocking tires on its property, rather than on the content of its speech, the court indicated that the regulation could be justified so long as there was a rational basis for the distinction. See *ibid.* And if there had been a content neutral reason for distinguishing among which signs to grandfather, that, too, would justify the distinction. See *id.* at 522.

In this case, the criterion used to determine which signs to grandfather is not the past, present, or future content of the sign but whether the speaker previously obtained a permit–a requirement applicable to all signs, not just commercial ones. Thus, the distinction turns on the speaker's actions, not the speaker's speech. Even assuming that sign owners did not have to comply with the permit requirement if it were unconstitutional, the penalty for noncompliance is not imposed because of content. In contrast, penalizing former speech was the fatal flaw in Somerville's ordinance, and it is impossible to predict what the First Circuit would have held if faced with the issue whether a municipality can penalize a speaker by silencing future speech based on whether the speaker in the past ignored an unconstitutional law (as opposed to engaged in speech with a particular content). Because the distinction between permitted and unpermitted signs is content neutral (not based on anything the signs ever said), and based on something the speakers did rather than said, *Somerville* in fact implies that the regulations here would need only a rational basis to pass constitutional muster. But no matter how the First Circuit would have ruled if faced with a regulation like the

one at issue here, there is simply no conflict between the decisions for this Court to resolve.

iv. As we explain above, petitioners' claim that the First Amendment is violated when future speech is conditioned on past compliance with an unconstitutional permit requirement fails on its merits. Here, the allegedly unconstitutional permit requirement never violated petitioners' First Amendment rights. And it is permissible to impose collateral consequences despite a prior constitutional infirmity in any event. Penalizing petitioners for not complying with the former permit requirement does not punish them based on the content of their past speech, and the grandfather provision passes muster under the scrutiny applicable to content-neutral regulations.

c. Petitioners' third question presents no issue worthy of this Court's review. Petitioners claim a "direct conflict" exists between the way the First Circuit analyzed certain ordinances in *Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996), and the way the Seventh Circuit analyzed other ordinances here. Pet. 27. In *Cambridge*, according to petitioners, the court examined a local zoning ordinance in combination with a state grandfather provision, whereas in this case, petitioners claim that the Seventh Circuit did not examine "the combined effect" of the distance requirement, the grandfather provision, and the former permit requirement. *Id.* at 27-28. They further decry that the First Circuit found the regulations it examined unconstitutional, but the Seventh Circuit did not. See *id.* at 28-29.

i. There is no conflict between the "approaches" (Pet. 29) used by the two courts in deciding which regulations to analyze. Both courts followed

the same approach–they examined "the combined effect" (*id.* at 27) of their respective ordinances and reached different results because the ordinances are different. In *Cambridge*, the municipality passed a zoning ordinance prohibiting signs based on certain content-neutral criteria such as height, size, and location. See 88 F.3d at 34. A state statute, however, afforded grandfather status only to certain signs and distinguished among them based on their past content–only those nonconforming signs that had contained onsite messages (messages about subjects related to the property on which the sign was located) received grandfather protection. See *ibid.* The paradoxical result was that signs containing noncommercial speech were denied grandfather status if the message pertained to something off the property, whereas signs containing commercial speech relating to the property were protected. See *ibid.* For purposes of its analysis, the court "treat[ed] the state grandfathering provision as part-and-parcel of the Cambridge ordinance" (*id.* at 35 n.6) and found that the scheme violated the First Amendment because it disadvantaged certain noncommercial speech and penalized certain speakers for the content of their past speech (see *id.* at 37-39).

In this case, the Seventh Circuit, like the First Circuit, analyzed all of the challenged provisions with which it was presented. It simply determined that the combined effect of the regulations at issue was content neutral. See Pet. App. 31a-32a. The court acknowledged petitioners' argument that the distance requirement is a regulation of commercial speech and applicable to their sign. See *id.* at 31a. But because petitioners had directed their challenge to the City's refusal to grandfather signs, like theirs, that lacked prior permits, while grandfathering signs

that had them, the court also examined the impact of those provisions on petitioners' sign. See *ibid.* It concluded that because the determination which signs to grandfather was not based on the content of the sign, but on whether the sign had a permit, and because the permit requirement was applicable to all signs, the combined effect of this scheme was content neutral. See *id.* at 31a-32a. Petitioners disagree with this conclusion (see Pet. 29), but that does not render the approach used by the Seventh Circuit in conflict with the First Circuit's approach. Both courts looked at all the regulations at issue.

ii. Even if there were a difference in the two courts' "approaches," the manner in which courts choose to interpret different local ordinances is not an important issue warranting this Court's attention, especially where the regulations at issue are not similar. That one Court of Appeals looked at a local ordinance in combination with a state statute, whereas another focused on only the ordinances having the most significance to the question before it presents no controversy of nationwide significance. And resolving this question would of course require this Court to delve into the minutia of local ordinances to determine which court properly identified the scheme to analyze, all in the service of tutoring the courts below on general methods of statutory analysis. This Court no doubt has better uses for its time.

iii. That the courts reached different conclusions concerning the schemes at issue also should not trouble this Court because of the differences between the regulations. Contrary to petitioners' assertion (see Pet. 28), the First Circuit did not determine whether the scheme it examined was content based or content neutral, instead "choos[ing] to sidestep

that difficult question" (88 F.3d at 37) because the regulations at issue distinguished among categories of noncommercial speech (the most favored type) and penalized speakers based on the content of their past speech (see *id.* at 37-39). The City's ordinances are not similarly flawed. They do not penalize noncommercial speech (in fact petitioners' sign even today could display a noncommercial message) and do not determine grandfather status based on what the sign said in the past, but instead based on whether the sign met the universally applicable permit requirement. And the scheme at issue in *Cambridge* involved a content-neutral zoning change (prohibiting signs based on size, height, etc.), but a content-based approach to determining which signs to grandfather. In contrast, the City's scheme involves a prohibition of advertising signs, but a content-neutral method of determining which signs to grandfather. When examining regulations so different, the courts understandably reach different results, and do not conflict if they do. This Court should reject petitioners' request to correct the errors they perceive with the decision below, and, as we have explained, this case was correctly decided in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GENERAL AUTO SERVICE STATION, AN ILLINOIS CORPORATION, F.A.Y. PROPERTIES, INC., AN ILLINOIS CORPORATION, AND COSMOPOLITAN BANK AND TRUST, SUCCESSOR TO THE COSMOPOLITAN NATIONAL BANK OF CHICAGO, NOT INDIVIDUALLY BUT AS TRUSTEE UNDER TRUST AGREEMENT DATED DECEMBER 21, 1994 AND KNOWN AS TRUST # 27340, PETITIONERS

v.

CITY OF CHICAGO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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CONSTITUTIONAL PROVISION

First Amendment to the United States Constitution .. *passim*

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The City of Chicago grandfathers a limited class of non-conforming signs. It conditions this benefit upon an applicant having previously secured a sign permit under a facially unconstitutional law. Chicago declares that "it is rational for the City to penalize sign owners who [did] not comply with the [former] permitting requirements, *even if unconstitutional* ...." Response 25-26. Emphasis added. The implications of the Seventh Circuit's decision to uphold the First Amendment constitutionality of this regulatory scheme are far-reaching.

In 1995, petitioners' sign lessee applied for a permit. After securing zoning certification, the lessee sent a letter to the local alderman requesting City Council approval. The request went unanswered, and the application languished without a decision. *See* App. 5a. Chicago's City Council (comprised of the City's 50 aldermen) was under no time deadline to respond; and would not have been bound to follow any standards had it determined to act on the request. Not until 1998 did Chicago: (1) standardize the procedure by which proposed signs would be introduced before the City Council; (2) require the City Council to approve or disapprove permits based on specific content-neutral criteria; (3) require permits to be issued to applicants whose signs complied with the Code, unless the City Council issues an order of disapproval; and (4) establish a time frame within which both the City Council and Commissioner of Buildings would be required to take final action on sign permit applications. *Compare* section 14-40-120, as amended on 2/5/98, App. 114a-117a, with prior versions of said provision, App. 109a-113a, and with versions of the provision requiring a permit, App. 104a-105a.

If not specifically intended to redress constitutional infirmities, these 1998 amendments were prescribed to achieve at least some level of municipal accountability. In the decades preceding 1998, unchecked and unbridled discretion in the performance of duties reserved to Chicago aldermen, and other City officials, had facilitated bribery, extortion, and other breaches of the public trust:

> In Chicago ... more than 400 public officials and employees, including 18 aldermen or former aldermen, have been convicted over the past 20 years for soliciting and taking bribes, extortion, or embezzlement of public funds in connection with zoning, building permits, business licenses, liquor licenses or law enforcement .... Ben Joravsky, *By Chicago Standards, Rosty Looks Honest,* L.A. TIMES, Aug. 1, 1993, at M1; [Harlan] Draeger, *supra* note 52 [*A Crime Waive for Aldermen,* CHI. SUN-TIMES, Jan. 1, 1992, at 1]; Matt O'Connor, *Roti Fixed Zoning, His Lawyer Concedes,* CHI. TRIB., Jan. 13, 1993, at 6.

Bradley C. Karkkainen, *Zoning: A Reply to the Critics,* 10:1, J. Land Use & Envtl. Law, 1994, 1, 43 note 155.

Two more Chicago aldermen pled guilty to taking bribes in 1996, and another alderman was convicted of conspiracy and extortion in 1997. *Caught and Convicted,* CHI. SUN-TIMES, June 17, 1997, at 2; *A Quarter-Century of Corruption,* CHI. SUN-TIMES, Dec. 5, 1998, at 2. "These [Chicago] numbers ... are probably just the tip of the iceberg, since it is likely that not all bribe-takers are caught and convicted." Karkkainen, *supra* note 157, at 44; *see also* Leon M. Despres with

Kenan Heise, *Challenging the Daley Machine – A Chicago Alderman's Memoir*, 104 (Northwestern University Press, 2005) ("In my 20 years [1955-75] in the city council, I found corruption in the city council easy to suspect but hard to establish ....")[1]

Unbridled discretion in determining who may obtain a permit and display a sign threatens more than disfavored speech. It threatens fair and open access to an entire medium of expression, enabling rogue officials to reward speakers willing to buy in, and silence others unable or unwilling to bargain for approval. The 1998 Code amendments that sought to abolish the unbridled discretion reflected in Chicago's sign permitting process failed to redress a significant and continuing infirmity within the City's permitting scheme: *Chicago determines which lawfully established but now nonconforming signs (such as petitioners' off-premises advertising sign) will be grandfathered based on one single and constitutionally defective factor - whether*

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[1] Despres maintained that at least half of his colleagues in the Chicago City Council would "sell" driveway permits issued under their *de facto* authority, given their control of City Council access on matters pertaining to their respective wards:

> They had no right to sell driveway permits, but they did so, and the prices went from a few hundred dollars for a backyard garage to thousands of dollars for a hotel. If you wanted to open a multimillion-dollar retail store and needed driveway permits for access, your alderman could hold you up, and frequently did.

Despres, *supra* at 34-35. Whether or not Despres overestimated the breadth of this particular permitting abuse, the underlying discretion to delay would have enabled Chicago aldermen, if they so chose, to taint fair access to permits.

the sign owner or operator successfully secured a sign permit pursuant to the pre-amendment Code. This carries forward the unconstitutionality of the pre-amendment Code, and penalizes a person's inability or disinclination to do whatever might have been necessary to secure a permit under a law that was devoid of any narrow, objective and definite standards.

Chicago thus conditions the benefit of a grandfathered sign upon having forborne the exercise of the constitutional right reiterated by this Court in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969): freedom to ignore such a defective licensing or permitting requirement, and "engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Id.* at 151. The Seventh Circuit's decision to sanction a scheme in which the government has avowed the authority "to penalize" the exercise of this constitutional right makes the decision below a compelling case for review.

I. The Decision Below Conflicts with Rutan and Perry.

In its decision below, the Seventh Circuit found the defects in Chicago's sign permitting scheme to be of limited constitutional relevance: "[T]he question for us is whether, by virtue of the defects in the permitting scheme as it existed [prior to 1998], Heerey and GASS also obtained a protected property interest in the sign as a lawful, non-conforming use, just as if Heerey had obtained a permit ...." App. 22a. Determining that no such property interest had been obtained, the Seventh Circuit found no violation of any due process property right. *Id.* Yet, under *Rutan v. Republican Party of*

Illinois, 497 U.S. 62 (1990) and *Perry v. Sindermann*, 408 U.S. 593 (1972), the constitutional "question" cannot be so constrained when the exercise of a constitutional right is at issue:

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

Rutan, 497 U.S. at 72, quoting *Perry*, 408 U.S. at 597.

So even if no *property right* will lie, the question remains as to whether Chicago denied *the benefit* of a grandfathered sign on a basis that infringes upon free speech. Chicago denied petitioners the benefit of a grandfathered sign precisely because of the exercise of a First Amendment right: the freedom to ignore the City's unconstitutional sign permitting "requirement." Such governmental action directly infringed upon petitioners' constitutional rights; and the Seventh Circuit's decision to uphold the dismissal of petitioners' First Amendment claim constitutes a significant departure from the Court's decisions in *Rutan* and *Perry*.

Chicago asserts that although petitioners[2] "challenged the former version of the permit requirement as an unconstitutional prior restraint in both courts below, [they] only [did so] in the context of their substantive due process claims, not their First Amendment claim." Response 21. Chicago thus claims waiver; but waiver cannot stand. Indeed, the very reason the district court dismissed petitioners' First Amendment claim was because it believed the claim to be duplicative: "nothing more than a restatement of [petitioners'] arguments that the City's refusal to grandfather [their] sign deprives [them] of [substantive] due process." App. 84a-85a. As the district court otherwise considered and rejected petitioners' argument that Chicago's former permitting requirement constituted an invalid prior restraint of speech, violative of the First Amendment (*see* App. 42a-45a), Chicago's circuitous claim of waiver is unavailing.

Chicago further maintains that the First Amendment argument now asserted was only made in petitioners' reply brief to the Seventh Circuit; and that although the argument was set forth in petitioners' opening brief to that court, it was only within the context of due process. Chicago again claims waiver (*see* Response 8-9); but again the defense will not stand. Arguments from the due process portion of petitioners' opening brief—addressing facial violations of the First Amendment—were expressly incorporated into that

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[2] Chicago states that "petitioners" participated in administrative and state court proceedings relating to the sign at issue (*see* Response 4-5); in fact, petitioners sought but were denied the right to intervene in those proceedings prior to their filing the instant federal action. *See* App. 8a-9a.

brief's First Amendment argument by reference to "*supra*." *See* Petition 18. Arguments fully pressed in each court below cannot be deemed waived.[3]

II. The Conflict with Outdoor Media Is Intolerable.

In *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895 (9th Cir. 2007), the Ninth Circuit addressed the same significant issue as in the case below: a First Amendment challenge to a billboard regulation, given the apparent absence of a property right in the billboard's display. Relying expressly on *Rutan*, the Ninth Circuit reversed a district court dismissal of a First Amendment challenge to a billboard regulation because the dismissal had been predicated upon the failure to show any property right in the billboard's display. *Id.* at 903.

In the case below, the Seventh Circuit took a conflicting and outcome determinative approach. Having found that no property right could vest by virtue of the sign's lawful display without a "required" permit, even if that requirement had been unconstitutional (*see* App. 22a), the Seventh Circuit upheld the dismissal of petitioners' First Amendment claim. *See* App. 29a-32a. With no property right stemming from the sign's prior use, the Seventh Circuit determined that Chicago's grandfather provision for

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[3] In any event, this Court's "traditional rule is 'that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited by the precise arguments they made below.'" *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (*citing Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

signs could only be scrutinized in isolation, (i) irrespective of the unconstitutional permitting requirement that the grandfather provision expressly invokes, and (ii) irrespective of the commercial speech regulation that the grandfather provision sometimes exempts. The outcome of the Seventh Circuit's First Amendment decision, therefore, was predicated upon its express determination that petitioners held no property right in the sign's display. *See id.* The fact that the circuit courts have split over the breadth of a fundamental constitutional right presents another reason why this case is ripe for review.

Chicago cites *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168 (2004) and *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) for the proposition that this Court does not ordinarily decide in the first instance matters not decided below. Chicago claims that the constitutionality of its former sign permitting requirement was not decided in either court below. *See* Response 17-18. Yet, the district court both considered and ruled upon this underlying issue, determining that Chicago's sign permitting requirement did not "implicate First Amendment concerns ...." App. 42a.[4]

The Seventh Circuit also considered the issue. It acknowledged the permitting scheme's lack of time deadlines, and lack of standards limiting the discretion of Chicago permitting officials. The Seventh Circuit

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[4] Although Chicago characterizes the district court determination as a "refus[al] to consider the facial challenge..." (*see* Response 17), that assertion is belied by the district court's express rejection of the challenge. *See* App. 42a-45a.

also outlined the relevant case law showing that standardless permitting schemes cannot survive First Amendment scrutiny. *See* App. 20a-21a. Only then did the Seventh Circuit determine that it would "accept without deciding that the features of the City's [former] permitting scheme ... indeed rendered the permit requirement incompatible with the First Amendment, such that [petitioners' predecessor in interest] was entitled to ignore it." App. 22a. The Seventh Circuit's determination that any such unconstitutionality holds no bearing on petitioners' First Amendment claim shows that *Cooper* and *Cutter* cannot justify denial of review by this Court.

III. The Conflict with City of Cambridge Is Intolerable.

The Seventh Circuit's refusal to address the commercial speech restriction at issue, *in conjunction with its grandfathering exemption*, represents a fundamental departure from how this Court has consistently analyzed permissible speech regulation. It has also created an intolerable conflict with the First Circuit's decision in *Ackerley Communications of Massachusetts v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996), which held firm to the Court's analytical framework when specifically presented with a sign restriction *modified by* a separate grandfathering exemption.

Indeed, the Court has consistently assessed the permissible bounds of a given speech regulation within the context of that regulation's applicable exemptions. As the Court noted in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994):

> an exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785-786 (1978). Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate. ..." *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.* 447 U.S. 530, 538 (1980).
>
> ...
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> Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy [because] they may diminish the credibility of the government's rationale for restricting speech in the first place. *See, e.g., Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-426 (1993).

Gilleo, 512 U.S. at 51-54. The Seventh Circuit's abandonment of this integrated approach has created an intolerable conflict regarding the proper analytical standard for determining constitutionally permissible restraints on free speech.

IV. The Asserted "Waiver" of a Time, Place and Manner Argument Is Illusory.

When government imposes a permitting requirement on free speech (as Chicago has done with its grandfather provision for nonconforming signs), this

Court has repeatedly determined that the constitutionality of such a requirement turns on whether the government also provides for "narrow, objective, and definite standards to guide the licensing authority." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citing *Shuttlesworth*, 394 U.S. at 150-151); *see also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988) ("[E]ven if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion." Emphasis in original.)

In the case below, petitioners cited *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) and *Forsyth County*, 505 U.S. at 131 in support of the proposition that content-neutral time, place and manner permitting schemes are unconstitutional where, as in the instant case, "the licensing official enjoy[ed] unduly broad discretion in determining whether to grant or deny a permit ...." GASS Amended Br. at 40 (quoting *Thomas*, 534 U.S. at 323).

Although the petitioners thus analyzed Chicago's permitting scheme as an invalid time, place and manner restriction, the Seventh Circuit determined that the First Amendment claim must fall because petitioners failed to analyze Chicago's grandfather provision, *in isolation*, as a time, place and manner restriction. This underscores the extraordinary departure the Seventh Circuit's decision represents from this Court's decisions concerning the analytical framework appropriate for determining the constitutionality of speech restrictions,

and provides another sound basis for review by this Court.

V. The Standing and Limitations Defenses Lack Merit.

Chicago acknowledges that the district court interpreted the Zoning Ordinance in effect at the time the sign went up as authorizing its legality; and that "[t]he City and the Seventh Circuit ... accepted that [determination] for purposes of the [Seventh Circuit] appeal. *Id.* at 4a." Response 2. Chicago, however, now asserts that this district court determination (*see* Appendix 66a-68a), based on a mixed question of Illinois law and fact, was incorrect; and that petitioners lack standing because their sign was never legal. *See* Response 12-14. The position is unavailing. *See Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("[T]his Court ... cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.")

Chicago's limitations argument is likewise unavailing. In moving the district court to dismiss the First Amendment count of petitioners' first amended complaint, Chicago attacked only the merits of the First Amendment claim, and asserted no statute of limitations defense. *See* Record 68. The defense of limitations, therefore, is waived. *See Wagner v. Fawcett Publications*, 307 F.2d 409, 412 (7th Cir. 1962) (refusing to entertain statute of limitations as a basis for upholding dismissal since, "by its motion to dismiss, [defendant] attacked the complaint on the merits, thus waiving [on appeal] the affirmative defense of the

statute of limitations ...."). Moreover, the Seventh Circuit otherwise found Chicago's limitations defense—*actually asserted in response to petitioners' substantive due process claims*—to be of dubious validity, and so chose to address the merits of substantive due process. *See* App. 17a-19a.

CONCLUSION

For the reasons set forth above and in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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